

SOLIDARITY AND CORREALITY

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Preface

This volume represents the first of a series of studies which, it is hoped, will eventually embrace a considerable portion of Roman law. I propose shortly to publish a monograph entitled 'General Observations on the Law of Stipulation', in which a number of subjects incidentally touched on in the present work will be considered in more detail. I have also in course of preparation a translation of Professor's Riccobono's 'Stipulatio ed Instrumentum nel Diritto giustiniano' from vols. 35 and 43 of the Zeitschrift der Savigny-Stiftung, which will show English students the methods pursued in elucidating the law of stipulation by one of the greatest modern masters of our ~~xxx~~ science. It is impossible to exaggerate the debt which research on numerous branches of Roman law owes to Professor Riccobono's efforts, ~~xxxix~~ and I take this ^{e present} opportunity of ^{ate}greatfully acknowledging my personal obligations to this learned and courteous teacher. Another master to whom I must acknowledge special indebtedness ^sif Professor ~~R~~ Ernst Levy, of Frankfurt-am-Main. But for the assistance derived from Professor's Levy's writings, the present work could never have been accomplished.

The method which I have adopted for indicating what I believe to be interpolations ^{and} noting possible restorations will best be explained by means of a ~~xxxxx~~ concrete example. Let us take Ulpian. D. (45.2)3 pr., infra p. 53. For the sake of convenience this pr. is divided into three periods $\alpha, \beta, \text{and } \gamma$. If the reader ignores all interpolation marks ^[], restoration marks $\langle \rangle$ and all italics, he gets the text as appearing in the ~~xxix~~ Digest. Let now examine the three periods separately.

ii.

α. In [^{reus}duobus ~~reus~~ promittendi] <~>¹⁾ frustra ~~in~~
timetur novatio

1) *sponsore vel fidepromissore adiciendo.*

The square brackets enclosing the words [duobus reus promittendi] indicate that in my opinion these words did not form part of Ulpian's original text; the fact that they are in italics indicates that in my opinion the compilers ~~xxxxx~~ invented them afresh and did not merely borrow them from some other part of the context. The following mark <~> indicates that in my opinion other words originally stood in the place occupied by the preceding duobus ~~reus~~ reus promittendi, the compilers having substituted the one set of words for the other. Note 1 shows what I conjecture Ulpian's original words to have been, viz., sponsore vel fidepromissore adiciendo. These words are in italics, because I have imagined them afresh and have not merely borrowed them from another part of the context.

β. [nam licet ante prior responderit posterior] etsi
ex intervallo accipiatur [^vconsequens^{est} dicere
pristinam obligationem durare et sequentem accedere:

The square brackets enclosing [nam ... posterior] have the same effect as before. 'Nam' is in ordinary small case letters because, as I conjecture, the compilers did not invent it afresh, but merely borrowed it from another part of the context, viz., the beginning of period γ.; the remainder of the enclosure is in italics on the same ground as before. The enclosure is not followed by ~~xxxxxxxxxxxxxxxxxxxx~~ the mark <~>, because in my opinion the compilers simply added the words in question, without deleting anything standing in their place.. The following enclosure [consequens... accedere] needs no further remark.

β . [et]¹⁾<~+>¹⁾ parveⁱ refert simul <->²⁾ [spondeant]³⁾<~>³⁾<+>⁴⁾
 an separatim [promittant], cum [hoc actum inter eos
sit]⁵⁾<~>⁵⁾ ut [duo rei]⁶⁾<~>⁶⁾ [constituantur]⁷⁾<~>⁷⁾ [neque]⁸⁾<~>⁸⁾
 ulla novatio [fiet]⁹⁾<~>⁹⁾.

XXXX

1) nam 2) cum reo 3) spondeat 4) vel fidepromittat
 5) ita ~~XXXX~~ interrogetur 6) sponsor vel fidepromissor
 7) constituatur 8) ~~XXXX~~ neve 9) fiet

The mark <~+> following [et] shows that in my opinion the compilers have substituted 'et' for something in Ulpian's text, and further that this something now appears in another part of the context. Note 1 shows that in my opinion the 'nam' now standing at the commencement of β . originally ~~XXXX~~ stood in this place. X 'Nam' is not printed in italics in the note, because I have not imagined it afresh. The mark <-> after 'simul' shows that in my opinion the compilers have here deleted something without putting anything in its place. Note 2 shows the deleted words to be 'cum reo', italicised because I have imagined them afresh. The square brackets enclosing [spondeant] shows that this word did not, in my opinion, stand in Ulpian's text, but the fact that only the n is in italics further shows that only this letter is due to the compilers. The ~~XXXX~~ following mark <~> and note 3 shows that in my opinion Ulpian wrote 'spondeat'; none of the letters of the latter word as standing in the note are italicised, because they are all found in the Digest text. The following mark <+> indicates that something now appearing (in whole or in part) elsewhere in the context originally stood here. Note 4 shows that in my opinion 'vel fidepromittant' originally stood here, the compilers having deleted the 'vel fide' and transferred the

~~promittat~~ 'promittat' (altered to 'promittant') to a little farther down. The remaining marks require no further explanation.

Now let us consider the reverse ~~xx~~ process, that is to say, let us print the text of , say, period γ. as in our opinion Ulpian wrote it, and mark the compilers supposed manipulations thereof;

[~]¹⁾<nam> parvi refert simul <cum reo> [~]²⁾<spondeat>
<vel fidepromittat> an separatim [+]³⁾, cum [~]⁴⁾<it^a
interrogetur>ut [~]⁵⁾<sponsor vel fidepromissor> [~]⁶⁾
<constituatur>[~]⁷⁾<neve> ulla novatio [~]⁸⁾<fiat>.

¹⁾ et	²⁾ spondeant	³⁾ promittant	⁴⁾ hoc actum inter
⁵⁾ eos dit	⁵⁾ duo rei	xxxxxx ⁶⁾ constituantur	⁷⁾ neque
⁸⁾ fiet			

Again, instead of placing either our restorations or what we believe to be the compilers' interpolations in foot notes, we may print both side by ~~xx~~ side in the text thus:

[et] <nam> parvi refert simul <cum reo> [spondeant]
<spondeat> (or simply spondea [n] t) <vel fidepro-
mittat> etc.

The reader will no doubt find ~~thix~~ these systems perplexing at first, and may be inclined to regard them as turning restoration into a Chinese puzzle. Really however they are all designed to bring out the 'mosaic' workmanship of the compilers on the classical texts.¹⁾ I have found them exceedingly helpful myself, and if the reader will persevere with them, I think he ~~xxx~~ will have the same experience.

¹⁾ see Riccobono, ZSS., 35. p. 242.

Finally the following abbreviated citations are
to be noted:

		cited as
Beseler. G., Beiträge zur Kritik der röm. Rechtsquellen (1910, -11, -13)		Beseler.
Binder. J., Die Korre ^a obligationen im röm. und heut. Recht. (1899).		Binder.
Girard. P.F., Manuel élé ^r mentaire de Droit romain. (6th ed., 1918).		Girard, <u>Man.</u>
Kr ["] üger. P., Institutes Digest Code	{ Vol. 1 of Corpus { Juris Civilis { (13th ed. 1920). { Vol. 2 of Corpus { xxx Juris Civilis { (9th ed. 1915)	Kr ["] üger, <u>Inst</u> . Kr ["] üger, <u>Dig.</u> Kr ["] üger, <u>Cod.</u>
Lenel. O., Palingenesia Juris Civilis (1889). Das Edictum Perpetuum (2nd ed. 1907).		Lenel, <u>Pal.</u> Lenel, <u>Edict.</u>
Levy. E., Die Konkurrenz der Aktionen und Personen im klass ["] röm. Recht (1918) Sponsio, fidepromissio, fideiussio. (1907).		Levy, <u>Konk.</u> Levy, <u>Sponsio.</u>
Zeitschrift der Savigny-Stiftung		<u>ZSS.</u>
xxx Bullettino dell' xxxxxxx Istituto di Diritto romano.		xxx <u>BIDR.</u>
Vocabularium Jurisprudentiae Romanae		<u>VIR.</u>
Heumanns Handlexi ^k on zu der Quellen des röm. Rechts (9th ed by E. Seckel)		Heumann-Seckel.
Basilika, Heimbach's edition.		Bas. Heimb.

§ 1 Modern History of the Correality-Solidarity Doctrine. *

To students of Roman law no subject is better known than the Correal-obligation as the source of a vast and barren literature. The modern history of the problem dates from the year 1827 when Keller published his celebrated work 'Litiskontestation und Urtheil' which was followed four years later by Ribbentrop's 'Zur Lehre von den Correalobligationen'. In these works a clear and definite distinction was for the first time drawn between 'correality' and 'solidarity in the narrower sense' (otherwise called 'simple solidarity')¹ as different branches of 'solidarity in ~~the wider or general sense~~ the wider or general sense'. Since then all but isolated writers have admitted the fact of this distinction; the question is, wherein does its basis lie? 'Correal obligations and simple solidary obligations are to be distinguished; on this point no doubt prevails. But as to the dividing principle there exists a wide difference of opinion.'¹

With regard to this distinction it must in the first place be observed that the recognition of two classes of solidary obligations in the wider sense is in itself perfectly natural. For example, we must admit a distinction between the case where A. and B. by a single joint contract bind themselves as sureties for a debt incurred by a third party and that where each binds himself as surety for this same debt independently of the other, perhaps without knowing of the other's existence. Again suppose A. and B. both con-

¹ -----
Dernburg, Pand. II. § 71; *Binder*, p. 482.

tribute to the commission of an injury against C., we must admit in theory a distinction between the case where both act in concert and that where each acts on his own account, though how far, if at all, the law will deem it practically expedient to discriminate between these two cases is quite a different matter. In all this, it will be observed, we come back to the familiar distinction between solidary obligations which are joint and those which are several, a ^{is} distinction which no mature body of jurisprudence can afford to ignore, though its ~~eff~~ effects differ widely in different legal systems.

The immediate basis of the Keller-Ribbentrop doctrine, however, depended on observations of the ^{was} working of process-consumption as the same is presented in the texts of the Corpus iuris. In certain cases it was noticed that litiscontest-ation between the creditor and one of two or more solidary debtors ¹⁾ freed the rest, - we shall ^x express this result by saying that process-consumption operates 'extensively', - while in other cases it was noticed that the result was the opposite, - process-consumption ^{here} operated ^s 'intensively'. On what principle must this antithesis be explained?

The basis of distinction which Keller for the first time definitely laid down and which ~~R~~ Ribbentrop worked up into a systematic body of doctrine may be stated thus : Process-consumption

1) only the passive relation is here of importance.

It will be observed that throughout this work I use the terms 'creditor' and 'debtor' in a wide sense to denote the active and passive parties to any ^{purported} obligatory ^{relation} ~~negotium~~, actual or prospective, valid or invalid; strictly speaking, of course, there can be no creditor or debtor unless and until a valid ~~negotium~~ obligation is actually created.

is 'extensive' when we have a single obligation (in the objective sense) with a plurality of subjective relations, - this is correality; process-consumption is 'intensive' where we have a plurality of obligations directed to one and the same end, - this is simple solidarity. This doctrine was held to be capable of reconciling all the discordancies which the Corpus iuris presents as regards solidarity in the general sense. Where we have a single obligation with a plurality of subjective relations, any fact (litiscontestatio, acceptilatio, novatio, compensatio etc.) which deprives this obligation of its 'objective substance' dissolves all the various subjective relations; where we have a plurality of obligations ~~directed to one and the same end~~ and, the fact of one of them being deprived of its objective substance does not per se prejudice the subsistence of the others, but as all the obligations are ex hypothesi directed to one and the same end, when this end is satisfied by a single solutio, all are extinguished.

The Keller-Ribbentrop doctrine at once gained a wide acceptance and soon established itself as communis opinio.¹⁾ Almost from the first, however, it provoked strenuous opposition. The main point of

¹⁾ No doubt one of the main reasons why this doctrine imposed itself so effectively was that it gave a clear utterance to tendencies which had previously been latent in juristic thought. The distinction between 'extensive' and 'intensively' process-consumption could not escape the notice of the earlier jurists, and ^{Favre,} ~~Faber,~~ Cujas and ^{Domeneau} ~~Donellus~~ had even operated with the idea of unity of obligation. See Binder's sketch of the pre-Ribbentrop doctrine, p. 484 ff.

attack was the conception of a single obligation (in ~~the object~~ the objective sense) with a plurality of subjective relations, which ^{numerous} ~~different~~ writers pronounced to be untenable, nay even absurd. The view that in correal-ity, no less than in simple solidarity, we have a plurality of obligations gradually gained ground, until in the second part of last century its adherents were probably in the majority, though the Keller-Ribbentrop doctrine still maintained its position as an article of the orthodox juridical faith.

So the struggle went. Volume after volume was published, theory after theory was propounded, but as to any possibility of the doctrine being settled on a rational basis there was never a sign. Hear what Ihering, writing in 1861,¹⁾ says on the ~~xxxxx~~ matter: 'Among the most refractory "legal-figures" which are possessed with a truly demoniacal obstinacy, foremost of all stands the Correal-obligation. Do you wish me to cite the literature of the "common law" on the subject? This ^{citation} ~~literature~~ would fill a note a yard long. Jurists of the present day may be divided into classes: those who have written on the Correal-obligation, and those who have not. The doctrine of the "Three in One" cannot have caused more brain-racking to the theologians than that of the 'Two or More in One' has caused to our civilians. Have we here one obligation with several subjects (on the one side or the other) or are there as many obligations as there are ^{such} subjects? Go around and enquire who has not laboured on this problem; count the sleepless nights it has caused to the students

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¹⁾ reproduced in Schertz u. Ernst in d. Jurisprudenz, 11th ed. p.8. (-erster Brief)

this literature, and the more I read of it, the more
confused I become. If I ever have to decide a

But if we ask our civilian zoologists how this distinction manifests practically, if the two-footer and the four-footer are put to the plough, the ~~majority~~ majority of them will, I believe, be unable to give any answer, and will evade the question by saying that zoology has nothing to do with ploughing. From a certain writer on the subject, to whom I had pointed out this defect in his work, I received the following answer: "The practical side of the question I have fundamentally excluded from my enquiries; I have dealt with ~~the~~ with the subject purely scientifically." A juristic writing which fundamentally ignores the practical application of its subject, a cunningly constructed watch which is not intended to go. Just herein lies the mischief; jurisprudence has been forced into a zoology, while really it is the art of ploughing with civilian oxen.

Another well-known passage from Ihering may suitably be applied to the literature on the correality-solidarity doctrine: "Then there arise

~~Christiana~~ Gheist d. röm. Rechts, II (2), 5th ed.,
p.324.

intellects of the day groped blindly in the dark, ignorant of the only method which would clear up the manifold discordances which the Corpus iuris presents.

By the last decade of the nineteenth century light had begun to dawn both in Italy and Germany. The monograph of ~~Ascoli~~ Ascoli, Sulle obbligazioni solidali, and that of Eisele, Correalitat und Solidaritat, deserve particular mention as harbingers of a new era in the history of our doctrine. The main position regarding unity of cause as the foundation of correality which ^{then} and other writers of this period adopt may be pronounced absolutely sound, though in points of detail more recent criticism has shown their views to be untenable.

In 1899 there appeared another important work, namely, Die Korrealobligationen im röm. u. im heut. Recht, by Dr Julius Binder, which sought to eliminate the distinction between correality and simple solidarity altogether. Following in the footsteps of ~~Kuntze~~ Kuntze²⁾, this learned writer ^{sought to} deposed ^d process-consumption from ~~xxxx~~ the chief seat in ~~xxxxcorreality~~ ^{solidarity} ~~xxxx~~ dogma and ^{to} constructed ^{ed} a single institute of solidarity based on extensive solutio-consumption. Binder's method and results ~~xxxx~~, it will now generally be admitted, are unsound, but nevertheless his work has exercised a considerable influence on subsequent doctrine. Much of his exposition is characterised by great acumen and his manner of applying textual criticism to the solution of the various problems presented is in many respects excellent.

¹⁾ in the Archiv für die Civilistische Praxis, 77, p.374 ff

²⁾ Die Obligationen u. die Singularsuccession (1856); Die Obligationen u. das ius extraordinarium (1886).

related The year 1918 saw the publication of a work, Die Konkurrenz der ~~Rechts~~ Aktionen und Personen im klass. röm. Recht, by Dr Ernst Levy, which seems at last to have placed our problem on the fair way to a satisfactory solution. Levy discards the terms 'co-reality' and 'solidarity' altogether, and treats the whole subject under the general heading of Aktion Action-concurrence. Two actions are said to 'concur' in the wide sense employed by Levy, when they are so related that a question may arise whether litiscontest-
 (ation) in the one does not extinguish the other. If this question is answered in the affirmative, the concurrence is ~~litis~~ determined in the sense of (process-) consumption, the two actions stand to one another in a consumption-relation; if it is answered in the negative, the concurrence is determined in the sense of cumulation, the two actions stand to one another in a cumulation-relation. For example A is the
 exercise A distinction must however be drawn between (i) consumption which operates under the ius civile and is specifically described as 'civil-consumption', and (ii) consumption which operates merely by virtue of the officium praetoris or officium ~~iudicis~~ iudicis, and is specifically described as praetorian consumption or judicial consumption, as the case may be. In
 praetorian and judicial consumption
 the second case the concurrence is determined in the sense of cumulation under the civil law, but this cumulation is counteracted by the officium praetoris or the officium iudicis.
 an intense Action-concurrence in the foregoing general sense is divided into Action-concurrence in the narrower sense and Person-concurrence. Action-concurrence in the narrower sense takes place when one single party has two or more dissimilar but

related rights of action against another single party; for example, A. lends a specific article to B. who injures it, so that ^{he}(A) has against B. both an actio commodati and an actio legis Aquiliae.

Person-concurrence takes place where a single party has similar and related rights of action against two or more parties respectively, or two or more parties respectively have similar and related rights of action against a single party. Person-concurrence is active or passive according as the plurality of parties is on the creditor or the debtor side.

When action-concurrence (in the narrower sense) and person-concurrence are combined, in other words when a single party has dissimilar but related rights of action against two or more parties, or two or more parties have dissimilar but related rights of action against a single party, a double concurrence takes place. For example A. is the exercitor of a ship and B. is the magister, both being freemen; C. contracts with B. and hence acquires a direct action against B. and an actio exercitoria against A.

Thus Levy's person-concurrence and the 'person' aspect of his double concurrence are concerned with the same phenomena as the correality-solidarity doctrine. In marked contrast to the theory of Binder, everything here ~~revolves~~ revolves round the determination of a concurrence of actions. In any given case what we ask is, has litiscontestatio an extensive or merely an intensive consuming effect? It is fully admitted of course that other facts besides litiscontestatio, notably solutio and acceptilatio, may have an extensive consuming effect, but this result is simply a corollary of the extensive consuming effect of litiscontestatio.

In the sequel I shall, however, endeavour to prove that the ^{alternatives} ~~antitheses~~ ~~corres-~~ ~~correspondence~~ ~~and~~ ~~simulation~~ were not the only ones admitted by the classical jurisprudence. On the contrary we seem bound to recognize the existence of a relation ⁱⁿ which duties, but not *litis contestatio*, and exclusive community of property. Under these circumstances I cannot see how we can avoid the proposed elimination of

Now as to the general soundness of ^{so far as it goes,} Levy's theory, I entertain no doubt whatever.¹⁾ ~~The only question I feel compelled to raise is regarding the advisability of eliminating the traditional technical terms 'correalty' and '(simple) solidarity'.~~ We may fully admit that ^{between them} these terms and the distinction ^{are} connected with one of the most unpleasing chapters of modern doctrinal history; also that the term 'concreus', from which 'correalty' is derived, is probably to be attributed to the compilers in the one passage where it occurs; also that the term 'in solidum' from which 'solidarity' is derived has in the writings of the classical jurists quite another connotation ~~from~~ ^{than} its modern derivative.²⁾ Yet ~~the theory which will be developed in the following pages when all is said and done~~ to dispense with these demands ~~the use of technical terms to distinguish two technical terms altogether can hardly be otherwise~~ ~~classes of solidary obligations (in the general sense), and it would~~ ~~than a source of great inconvenience.~~ ~~be altogether unreasonable to abandon those already current and in vogue others.~~

If it be objected that the ideas expressed by the terms ^{'correalty' and '(simple) solidarity'} ~~in question~~ are ~~at~~ quite uncertain, that there is a wide diversity of opinion regarding the basis of the distinction ^{between them}, I reply that the basis of distinction as formulated by Keller and Ribbentrop is literally correct, and is indeed the only possible one if we confine our attention to the classical law of Rome. In correalty we have two obligations objectively identified so as to form constructively one and the same obligation; in simple solidarity we have two obligations, not objectively identified, but directed to one and the same juristic end.

Let it not however for a moment be imagined that we are followers of Keller and Ribbentrop; we adopt their basis of distinction indeed but that is all. For the rest, the advance of the science of

1) D.(34.3) 3.3.

2) Levy, *Recht*, p. 10.

textual criticism during the past thirty years or so entitles us to treat the ^{en}entire literature prior to about the last decade of the nineteenth century in the way recommended by Ihering, namely, 'to forget all we have ever heard or read of correal obligations'.

to a prestation from a second party, Maevius, or to a prestation from a third party, Seius, and so on; or conversely, that M. is entitled to a prestation from T. or S. is entitled to a prestation from T., and so on. In the passive case, that is, where the plurality of parties is on the debtor side, the creditor is entitled to exact from any one of the debtors the prestation due by that debtor, but having done so, he has no further right against the others. In the active case, that is where the plurality of parties is on the creditor side, any one of the creditors is entitled to exact from the debtor the prestation due to himself, but when he has done so, the rights of the remainder are gone.

The idea of subjective alternativity then is that only one of the different passive subjects can be made to render a prestation, and the rendering of a prestation by any one of them has the same effect as the rendering of a prestation by any other; and conversely, only one of the different active subjects can demand the rendering of a prestation, and the rendering of a prestation to any one of them has the same effect as the rendering of a prestation to any other. In short only one prestation has to be rendered, and it is a matter of juridical indifference by or to which of the various subjects it is rendered. Subjection

1) Henceforward when we use the terms 'solidarity', 'solidary', 'solidarily', alone, we always mean them in the active sense. When the passive sense is intended, we prefer 'co-obligation'.

The most pronounced element in the general institute of Solidarity¹⁾ is that which we call

'subjective alternativity'. This latter expression signifies that a first party, Titius, is entitled to a prestation from a second party, Maevius, or to a prestation from a third party, Seius, and so on; or conversely, that M. is entitled to a prestation from T. or S. is entitled to a prestation from T., and so on. In the passive case, that is, where the plurality of parties is on the debtor side, the creditor is entitled to exact from any one of the debtors the prestation due by that debtor, but having done so, he has no further right against the others. In the active case, that is where the plurality of parties is on the creditor side, any one of the creditors is entitled to exact from the debtor the prestation due to himself, but when he has done so, the rights of the remainder are gone.

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¹⁾ Hereinafter when we use the terms 'solidarity', 'solidary', 'solidarily', alone, we always mean them in the wider sense; when the narrower sense is intended, we prefix 'simple'.

1) common interest
between the
different obligations,
which unity is a
necessary element
of all solidarity
relations.

alternativity implies a unity of material cause, juridical end, and

We may however take it that this idea of subjective alternativity is not the only ^{factor} element in solidarity. If for example T. were entitled to claim Stichus from M. or a sum of X from S., we should hardly describe the two obligations as solidarily related. A solidarity relation as commonly understood demands what we call 'substantial objective equality of obligation' or 'substantial equality of prestation'. In order to understand the force of these phrases we must consider briefly the manner in which an obligation should be analysed from the standpoint of the classical Roman law.

An obligation, regarded as a legal phenomenon may be analysed in the first place in subjects (i.e. the parties) and content in the wide sense (i.e. the act or forbearance to be performed or observed together with

all modalities affecting the prestability of such act or forbearance. (ii) This content may be analysed into

(a) object and content in the narrow sense, these elements being particularly described as obligation-object and obligation-content, by way of contrast to the prestation-object and prestation-content about to be mentioned. (a) The obligation-object is the act or forbearance, otherwise called the prestation, - the dare (dari), facere (fieri) or ~~non~~ non facere (non fieri), - considered apart from any modalities affecting its prestability. (b) The obligation-content consists of the modalities. The most important of these latter are suspensive conditions which render the obligation imperfect, - make the prestability of the act or

2) it is quite immaterial whether we use the active or the passive voice in such connections; perhaps the passive is preferable as having a more abstract connotation.

1) We must ^{assume} ~~presume~~ that the reader is generally acquainted with the significance of these terms; as to 'material cause' cf. Vinogradoff, *Historical Jurisprudence*. I. p. 22 ff. With 'material cause' there must not be confused the 'originating a constitutive cause' (otherwise described as the 'causa civilis') of an obligation or action, namely, the dispositive fact out of which the obligation or action arises.

(i) The subjects are parties between whom the obligation exists; and they call no more here.

forbearance altogether problematical, - and suspensive terms (dies) which render the obligation immature, - cause the prestability of the act or forbearance to be postponed. Resolutive conditions and terms seem also to belong to the obligation-content.

In the case of obligations dari the obligation-object or prestation must be analysed into two elements, (α) object and ^(β) content, which are particularly described as prestation-object and prestation-content. (α) The prestation-object is the thing, physical or ideal, of which the obligation 'disposes'. (β) The prestation-content is the 'disposition' itself, - the act of 'giving' abstracted from any object, - together with all modalities affecting such act, for example, a provision as to the place of payment, *and also all regulations as to liability should the prestation-object not be duly rendered.*

Certain obligations fieri, for example an obligation rem tradi, for the purposes of analysis correspond to obligations dari (exactly), being excluded from the latter category solely on account of the narrow technical significance of dare. Other obligations fieri fall less naturally into the scheme marked out for obligations dari; in particular if we adhere to the analysis of prestation into object and content we have to construct a somewhat artificial prestation-object. For example, in the case of an obligation domum aedificari, the ^{house} house itself must be regarded as the prestation-object, though at the time of ~~the~~ making the obligation its existence is purely prospective; again in the case of any obligation for rendering a certain quantity of service, the service itself, or

7) meaning of ~~substantive liability~~ of obligation
= to make a thing the property of the recipient;
Heumann-Seckel, s.v. dare 1)e)), p.120

substantially equal objects or prestations, the following conditions must be fulfilled: firstly (1) the two prestations must be homogeneous in the sense that each

otherwise expressed so many units of labour, must be regarded as the prestation-object.

In the case of obligations non fieri the analysis of prestation into object and content is altogether unnatural and should not be attempted.

The foregoing analysis has no reference to the binding element, - 'vinculum iuris', & 'oportere', - which is assumed to be present in every obligation and the nature and origin of which cannot be discussed here. An exact synonym for obligation, as above represented is 'obligatory relation'. The substantive right of the creditor may be described as his 'obligatory right', by way of contrast to his adjective right of suing on the obligation, called briefly his 'action-right'. Conversely the substantive liability or duty of the debtor may be described as his 'obligatory liability or duty', by way of contrast to his adjective liability to be sued, or duty of joining issue in an action brought against him, called briefly his 'action-liability or -duty'. The term obligation may be used loosely in the sense either of obligatory right or of obligatory ~~and~~ liability or duty.

In the present treatise we shall be concerned almost exclusively with obligations dari. When we have occasion to mention obligations fieri, we shall assume the same mode of analysis to be applicable in their case as in that of the ^{former} ~~former~~. Obligations non fieri lie without the scope of our enquiry.

2 We are now in a position to consider the meaning of 'substantial objective equality of obligation' or 'substantial equality of prestation', as an element in solidarity. In order that two obligations may have substantially equal objects or prestations, the following conditions must be fulfilled: ~~firstly~~ (1) the two prestations must be homogeneous in the sense that each

must belong to the same category of act or forbearance, and (ii) the two prestation-objects must be equal, either in toto or pro tanto.

In order to understand the second of these conditions, we must in the first place consider the distinction between 'generic' and 'specific' prestation-objects. A prestation-object is generic when it consists of a sum of money, a quantity of some other fungible genus, or we must add, an indeterminate species of a non-fungible genus (e.g. a slave generally). A prestation object is specific when it consists of a determinate species. The basis of this distinction lies in the fact that a specific thing (e.g. the slave Stichus, the fundus Cornelianus ~~et~~) has, while a generic thing (e.g. X sestericia) has not, an 'individuality' of its own apart from its position as prestation-object of a particular obligation. A generic thing is endowed with concrete existence simply for the purposes of the particular obligation; a specific thing has already an independent concrete existence which the obligation does not affect.

For our present purposes the fact which we have to observe is this, namely, that while two generic prestation-objects may be equal though quite distinct, two specific prestation-objects, suppose that T. is entitled to claim e.g. one sum of X is equal to another sum of X, on the other hand juristic equality of a specific prestation-object is impossible without identity thereof. Thus, two obligations Stichum dari and Pamphilum dari have not equal prestation-objects in the juristic sense, even though economically the two slaves may be of exactly the same value; the individuality of a specific thing prevents it being regarded as juristically equivalent to another specific thing.

If we omit all reference to real rights.

In the second place it is to be observed that the equality^{which we are speaking} may be either in toto or pro tanto.¹ In toto equality means that the whole of the one prestation-object is equal to the whole of the other; for example, one sum of X is equal in toto to another sum of X.

Pro tanto equality means that some element in the one prestation-object is equal to ^{the whole of, or to} some element in the other.² For example, consider two prestation-objects, XV and X; the XV may be analysed ~~into~~ into X + V, and the element of X is equal to the other X. Again consider a 'compound' prestation-object decem et Stichus, and a 'simple' prestation-object, decem; quoad X there is equality, so also in the case of two compound prestation-objects decem et Stichus, decem et Pamphilus,^{is similar} A more difficult case is where one of the prestation-objects is 'compound in the alternative', e.g. decem aut Stichus, and the other contains one of the same alternative elements either alone ~~or in combination with~~ e.g. decem, or in combination with other elements, e.g. decem et (aut) Pamphilus.

~~xxf~~ This case will meet us in connection with D.(45.2)15.

Combining the ideas of 'subjective alternativity' and 'substantial objective equality' we arrive at the ordinary conception of solidarity in the general sense.

To take an example of passive solidarity with generic³ prestation-object, suppose that T. is entitled to claim X from M. or to claim X from S. Here T. has the right of 'electing' whether he will claim the full X from M. or from S., and is not obliged to split up his claim between them; but he cannot exact more than a single sum of X. Again to take an example of active solidarity with specific prestation-object, suppose that M. is entitled to claim Stichus from T. or S. is entitled to claim Stichus from T.. Here M. and S. have each a right of

'occupation', that is, either can claim the entire property in Stichus (and not merely a pro indiviso share thereof), and so can exclude the other, for not more than a single prestation of Stichus or his value can be exacted from T.

It will be observed that the objective equality necessary to the ~~existence~~ existence of solidarity has been qualified merely as substantial, not absolute. The significance of this qualification is that we not/^{here}require equality of prestation-content between the ^{two} obligations. Thus suppose T. were entitled to claim X from M. at Rome or X from S. at Capua, the existence of a solidary relation will hardly be denied, in spite of the modal discrepancy. It may further be observed that solidarity is quite independent of any difference as regard modalities of condition and term, these latter belonging to the obligation-content, not to the prestation-content.

Now the present treatise will, I think, render it plain that the civil law, by reason of its formalistic nature and its subjection to processual ideas, could reach the ~~conception~~ conception of solidarity as above explained in one way only, namely, through the construction/^{not merely} of an objective equality, but of an objective ^{identity} unity, between the two or more obligations in order that process-consumption might operate extensively. On the basis of such constructive ^{identity} unity the civil law institute of joint obligation in solidum which we call correality was established, and ^{to} its establishment there were two conditions precedent: (i) absolute and not merely substantial objective equality; two prestations cannot be identified as one and the same unless they are precisely equal; moreover the equality must be in toto and not merely pro tanto; and (ii) a single cause from which both it will be observed we are here speaking only of principal correality vide infra p.

obligations originates and which serves to achieve the identification of the two prestations. Unless these two conditions were fulfilled, nothing in the nature of correality was possible under the civil law.

~~xxxxxxxxxxxxxxxxxxxxxxxx~~ If however these two conditions were fulfilled, two (or more) obligations were produced with a constructive unity of prestation (idem debitum); by construction of law the two obligations were deemed to make up a single correal obligation ^{i (eadem obligatio, eadem res)} which had a juristic individuality of its own. / On the other hand It cannot however be too strongly emphasised that this unity of obligation is a pure piece of legal construction for a ~~part~~ certain definite end, to wit, in order that process-consumption may operate extensively. Apart from this end each obligation maintains its own individuality, which fact appears prominently when the question of ^c confusion arises.²⁾ It is therefore immaterial whether we speak of a single correal obligation or of two (or more) obligations correally related; sometimes it is more appropriate to use the one, sometimes to use ^{the} other of these expressions.

It is an undoubted fact that the civil law institute of correality was ~~xxxxx~~ evolved within the sphere of the formal negotium of stipulatio.¹ Here a correal relation could be produced only by means of a special stipulatory form which we call the correal stipulation.² The correal stipulation was governed by stringent rules which excluded any other result than ~~the~~ the production of two objectively ~~q~~ equal and identified co-existing obligations.³ Any 'inequality'

1) it will be observed that we are here speaking only of 'principal' correality ; vide infra p. 72 .

3) except that under circumstances a correal stipulation incapable of fulfilling its proper end might produce a valid 'simplex' obligation, by 'simplex' obligation as opposed to correal obligation we mean an obligatory relation with only a single party on either side.

2) cf. infra p. 138

or 'non-identification' appearing formally in the terms of the stipulation rendered the whole act null and void, and the same result must, I believe, have occurred where the ~~stipulation~~ stipulation was formally unimpeachable, but there existed some element in the situation which caused a material 'inequality or non-identification.'

At a certain ^{period,} probably in the early days of the Empire, jurisprudence extended the institute of correality to the real and consensual contracts of the *ius gentium* which had now been received into the civil law. But in this transference of an institute which had been evolved on strictly formal lines to the sphere of formless negotia, the following change would seem to be inevitable: Suppose a ~~stipulation~~ ^{correal} real or consensual contract contains some element which excluded the equality or identification necessary to the establishment of correality, it would be quite anomalous to hold the contract null and void. Hence, I conjecture, jurisprudence was driven to invent a species of non-correal or ~~simple~~ simple solidarity which did not depend on the idea of objective unity of obligation and in which therefore *litiscontestatio* had not, though *solutio* had, an extensive consuming effect. I further conjecture that this institute of simple solidarity subsequently gained a footing within the realm of solidarity *ex stipulatu* to the extent that, where correality was excluded through a purely material inequality or non-identification, a correal stipulation was no longer held null and void on that account, but was allowed to produce a simple solidary relation. ~~Further~~ The ~~the~~ details of this process are reserved for the sequel.

Such then in outline is the correality-solidarity theory which I propose and shall seek to establish by a critical examination of a considerable number of passages. A supplementary point must be mentioned

We may with confidence assert that anything in the nature of solidarity without unity of originating cause was abhorrent to the civil law. This principle maintained itself even within the ~~xxx~~ realm of the formless negotia, and I believe we are justified in holding that not even in the latest days of the classical jurisprudence could a legal solidary relation be constituted between two obligations where unity of cause was lacking. On the other hand we have clear evidence that two obligations cumulatively related at law might in equity be related solidarily. Hence we must admit the existence of an institute of equitable solidarity and investigate the principles by which it was governed.

In conclusion of this section we must draw ~~attention~~ attention to certain facts connected with the division of solidarity into active and passive.¹⁾ Passive solidarity is a conception which presents itself so naturally that every legal system worthy of the name must afford some form of recognition thereto. Active solidarity on the other hand is a purely artificial conception which could without very great inconvenience be dispensed with altogether. The difference is that in passive solidarity we have only a single creditor with a single interest to be satisfied, and it matters nothing from what source satisfaction proceeds, whereas in active solidarity we have a plurality of creditors each with a separate interest to be satisfied, and these interests have to be identified artificially as one and the same ~~either~~ by act ~~of~~ either of the parties or of the law itself. Active solidarity presents itself outwardly as a race for 'occupation'; the creditor who wins carries off the whole prize and the rest get nothing. ~~We shall~~

1) It is, of course, possible for a ~~solidary~~ solidary relation like both active and passive, that is, when a plurality of parties on ^{either} ~~each~~ side, but we may omit all reference to this complicated case.

~~have something further to say on these matters later.~~

Under these circumstances there can be little doubt that in Roman law passive ~~xxxx~~ correality was decidedly older than active correality; in fact as we shall see, even in the mature classical period the ~~theory~~ of active correality seems still to have been involved in some doubt. ^{1/2} We may however assume that the incidents of the active correal relation were so worked out as to run parallel, so far as was possible, with those of the passive relation. Moreover the case of the active active correal stipulation affords some notable examples of the exclusion of correality and the introduction of simple solidarity on the ground of material 'inequality' and 'non-identification.'

to its study a special monograph is being dedicated and will appear shortly. Accessoriality, like correality, is based on the conception of unity of obligation, but, unlike correality, it does not place the different debtors or creditors on a co-ordinate footing. The conception of a formally accessory relation was gradually developed in Roman law.

^{1/2} vide ~~infra~~ p. 134. appear, two parties whose material relation was that of principal debtor and sponsor must bind themselves as co-principal debtors; it may be, indeed, that the earliest species of correal obligation had as its passive subjects parties whose material relation was as just described. The whole history of Roman suretyship was a striving towards the idea of formal accessory. Likewise in the active case, a principal

principles

A few words must be added as to the scope and disposition of the present work. No attempt is here made to cover the subject of solidarity in all its manifold bearings. We merely seek to discover the essential principles underlying solidarity ^{contracts} ~~ex stipulatu~~ in the classical and Justinianian legal systems respectively. In future studies we hope to apply the results here attained in a variety of directions. Certain of the delimitations which we have imposed on this work call however for some remark. In the first place it will be observed that the relation of principal and accessory debtor (or creditor) has been entirely eliminated. This relation we call Accessoriality and to its study a special monograph is being dedicated and will appear shortly. Accessoriality, like correality, is based on the conception of unity of obligation, but, unlike correality, it does not place the different debtors or creditors on a co-ordinate footing. The conception of a formally accessorial relation was only developed gradually in Roman law. Originally, it would appear, two parties whose material relation was that of principal debtor and sponsor must bind themselves as co-principal debtors; it may be, indeed, that the earliest species of correal obligation had as its passive subjects parties whose material relation was as just described. The whole history of Roman suretyship was a striving towards the idea of formal accessoriality. Likewise in the active case, a principal largely bound up with those just indicated.

In the fourth place we have, as far as possible, eliminated all discussion of the 'inner' relations between co-creditors and co-debtors and of the rights of regress which these inner relations afford. Correality is per se

creditor and adstipulator may at first have stipulated formally as correal creditors, though latterly their relation assumed a formally accessorial complexion.

An important distinction between correality and accessorality is that, while the former relation depends essentially on unity of originating cause, the latter relation is antagonistic to ^{such} ~~this~~ unity. Thus there can be little doubt that the proper form for taking a principal debtor and fideiussor bound was by means of separate stipulations; the employment of a joint stipulation for this purpose, though it seems to have been tolerated, can hardly be described as other than anomalous.

the nature
civil jurisprudence

In the second place we have omitted all reference to these complicated questions which arise from the nature of the prestation-object as imperfectly divisible or indivisible. The divisibility and indivisibility here referred to are juristic, and not necessarily natural; thus slave Stichus is divisible juristically inasmuch as he may be owned in pro indiviso shares, though naturally he could not be divided without destroying his existence as a living slave. But consider an obligation to give a slave generally; this obligation I describe as imperfectly divisible on the ground stated by Paul in D.(45.1)2.1; op. also Julian D.(46.3)34.1. The standing example of an indivisible prestation-object is a predial servitude.

In chapter In the third place we have omitted all reference to the case where a creditor or debtor dies leaving co-heirs, the complications which this case involves being largely bound up with those just indicated.

In the fourth place we have, as far as possible, eliminated all discussion of the 'inner' relations between co-creditors and co-debtors and of the rights of regress which these inner relations afford. ^{Solidarity} Correality is per se

quite independent of any question of inner relation
the classical system.
between the different parties on the one side ~~of~~ the
Finally in chapter V (§§ 33-37) we shall discuss
other.

Solidarity from real and consensual contracts, and shall
By means of these limitations we have endeavoured
find here certain authorities which shed a most important
ed to keep the present monograph within reasonable
light on the subject in general.
bounds and to avoid digressions from the main problem
set before us.

The correality-solidarity theory which we
here submit to the judgment of the learned public is in
certain respects quite new, and some of the positions
taken up by us depend on a mode of textual criticism
which is ~~as~~ about as ~~bold~~ daring as anything ~~as anything~~
yet attempted in this line. I am only too sensible
to what an extent I lay myself open to the charge of
'presumptuously pretending to re-make the ancient texts
and of uselessly exercising an arbitrary prepotative
to the destruction of all truth'.¹⁾ Yet without a
certain boldness of conjecture, it seems impossible to
reach any solution of the problems here presented.¹

The disposition of the sequel is as follows:
In chapter II (§§ 4-20) we shall discuss Correality ex
stipulatu in all its various bearings and seek to dis-
cover the essential principles governing the civil law
institute. A brief appendix (§ 21) on correality from
nexum, litteral contract and testament will be added.
In chapter III (§§ 22-27) we shall discuss Simple and
Equitable Solidarity ex stipulatu, and in this connection
we shall take the opportunity of demonstrati^ung the antag-
onism of the civil law to anything in the nature of
solidarity without unity of ~~cause~~ originating cause.
In chapter IV (§§ 28-32) we shall discuss Solidarity
~~in the Justinian law~~ ex stipulatu in the Justinian law, observing
the immense contrast which the latter here presents to

the classical system.

Finally in chapter V (§§ 33 - 37) we shall discuss Solidarity from real and consensual contracts, and shall find here certain authorities which shed a most important light on the subject in general.

The origin of the stipulation is still involved in darkness; the latest researches on this subject may be said to centre round Mitteis's hypothesis that stipulation as we know it had been derived from the processual suretyship of the *procurator* and *reus*. The origin of the correal stipulation shares in the general obscurity, but Mitteis's hypothesis suggests some interesting speculations. Is it not possible that the earliest correal stipulation was a betwixt a creditor on the one side and a principal debtor and a sponsor on the other?

We cannot in this place undertake any investigation of an antiquarian nature, but we accept the existence of the correal stipulation as an established fact. The questions we do ask are, why was this particular form as described in the Institutes chosen? Why these separate questions and in the passive case these separate answers? Why this intermingling of questions and answers so that, until the interrogatory is complete, no response is given? Why the inflexion of *idem* (*eadem*) in the second question of the interrogatory? The solution of these problems is to be found negatively in the results which the correal stipulation was designed to exclude, and positively in the result which it was designed to produce.

¹ Über die Entstehung der Stipulation: eine Hypothese in Mitteis' *Zeitschrift f. Rechtsgeschichte* f. Bekker, 1907), p. 107 ff.

  4 Outline

It is universally admitted that the civil law institute of correalit  was developed within the sphere of obligations ex stipulatu, and our main interest is therefore fixed on that special stipulatory form which (III.16*) the compilers of the Institutes have fortunately handed down to us and which we call the correal stipulation.

The origin of the stipulatio is still involved in darkness; the latest researches on this subject may be said to centre round Mitteis's well-known hypothesis¹⁾ that stipulation as we know it had been evolved from the processual suretyship of the praedes and vades. The origin of the correal stipulatio shares in the general obscurity, but Mitteis's hypothesis suggests some interesting speculations. Is it not possible that the earliest correal stipulation was a between a creditor on the one side and a principal debtor and a sponsor on the other?

We cannot in this place undertake any investigations of an antiquarian nature, but must accept the existence of the correal stipulation as an accomplished fact. The questions we do ask are, why was this particular form as described in the Institutes chosen? why these separate questions and in the passive case ~~these~~ separate answers? why this ~~interchange~~ intermingling of questions and answers so that, until the interrogatory is complete, no response is given? why the inflexion of idem (eosdem) in the second question of the interrogatory? The solutions of these problems is to be found negatively in the results which the correal stipulation was designed to exclude, and positively in the result which it was designed to produce.

¹⁾  ber die Herkunft der Stipulation: eine Hypothese in Aus r m. u. b rg. Recht, (Festschrift f. Bekker, 1907), p. 107 ff.

The results which the correal stipulation was intended to exclude are three in number: partition, novation and cumulation; their exclusion forms the subject of the following sections, §§ 5 - 11.

The result which the correal stipulation was intended to produce was the simultaneous creation of two or more co-ordinate obligations with different subjects on the one side or the other, but with an identity of object (*idem debitum*) in respect whereof they were regarded as one and the same obligation (*eadem obligatio; ~~obligatio~~ eadem res*). In ~~sections~~ ^{§§} 12 and 13 we shall discuss this unity of obligation and a special element therein, namely, 'extensive responsibility' for ~~wrongful acts and neglects.~~ *culpa and mora.*

Thereafter we shall take a comprehensive survey of the requisites of the correal stipulation (§§ 14 ^{- 17} ~~15~~), and then consider the vital question of ^e*eadem res* and civil consumption. (§§ 18 and 19).

Finally we shall consider the subject of ^a*Actiones* on a correal obligation' (§ 20), and by way of an appendix mention ^c*Correality* from *nexum*, *litteral contract* and testament, (§ 21).

This course of investigation will, it is hoped, place in a clear light the institute of correality *ex stipulatu* which had its roots deep in the civil law. The all important point is the necessity of a joint stipulatory act, (so framed as to exclude partition), in order that a civil law ^{principal} correal relation may be produced. Destroy the unity of originating cause and you inevitably have two formally distinct obligations, in which case one or other of ^{three legal} ~~the~~ results must take place: (i) the later obligation novates the earlier or (ii) both obligations co-exist cumulatively so that neither *litis-contestatio*, *solutio*, nor any other fact bearing ~~in~~ on the one alone can in any way prejudice the subsistence of the other, ¹⁾ or (iii) the later obligation is null

1) *equity* may reduce this cumulation to *solidarity*; see our subsequent exposition of 'equitable solidarity' p 194 ff.

and void. Maintain the unity of originating cause, under the strict civil law and the only possible alternatives (partition being excluded) are (i) constructive unity of obligation, i.e., correality, and (ii), ^{where} ~~whereas~~ such unity is excluded on formal or material grounds, total or partial nullity of the act.¹⁾ The other alternative, namely, simple solidarity, represents a derogation from strict civil law principles on the part of the classical jurisprudence.

Now when all the requisites of a joint contract are fulfilled, one possible result is 'partition' of the prestation promised. This means that each of the various debtors becomes bound to render, each of the various creditors becomes entitled to claim, a separate pro rata share of the prestation and that alone, as sole debtor or creditor. Whether the basis of division be equality or some other proportion does not here concern us, and we ignore the complications which arise where the prestation-object is only imperfectly divisible or not divisible at all.²⁾ Obviously partition and ~~solidarity~~ ^{correality} are directly opposite results; the former must be excluded if the latter is to be produced. Partition implies the creation of a number of independent and cumulative obligations; each of these latter has an object peculiar to itself alone, and no fact bearing on one only can

¹⁾ Partial nullity takes place where the joint act produces a valid simplex obligation, but quoad ultra is ineffective.

In order that partition may take effect, there must be a ~~single~~ ^{single} whole prestation to be divided and this whole prestation forms the object of an ideal correal obligation. If then in any concrete case we find a decision in favour of partition or a discussion as to its possibility, by simply excluding this result we at once arrive at correality. The very suggestion of partition shows

The question of partition introduces to us the whole theory of joint contract. By a joint contract we do not mean simply that a number of agreements have for the sake of convenience been concluded more or less simultaneously. What we do mean is that several parties have together made or received promises which purport to cover one and the same prestation.¹

Now when all the requisites of a joint contract are fulfilled, one possible result is 'partition' of the prestation promised. This means that each of the various debtors becomes bound to render, each of the various creditors becomes entitled to claim, a separate pro rata share of the prestation and that alone, as sole debtor or creditor. Whether the basis of division be equality or some other proportion does not here concern us, and we ignore the complications which arise where the prestation-object is only imperfectly divisible or not divisible at all.¹ Obviously partition and ~~solidarity~~ ^{correality} are directly opposite results; the former must be excluded if the latter is to be produced. Partition implies the creation of a number of independent and cumulative obligations; each of these latter has an object peculiar to itself alone, and no fact bearing on one only can prejudice in any way the subsistence of the others.

There is however another aspect of the antithesis ~~correality~~ ^{solidarity} v. partition which has to be attended to. In order that partition may ~~xxxx~~ take effect, there must be a ~~single partitionxxxxxxdivided~~ single whole prestation to be divided and this whole prestation forms the object of an ideal correal obligation. If then in any concrete case we find a decision in favour of partition or a discussion as to its possibility, by simply excluding this result we at once arrive at ~~solidity~~ ^{correality} reality. The very suggestion of partition shows

¹ vide supra. p. 24

that one and the same prestation is due by, or to ^{all} the various subjects ^{together}, and if we held each bound ~~in~~ or entitled in solidum instead of *pro rata*, we have that identity of prestation on which the institute of correality is based. ¹⁾

We have already had occasion to observe that passive solidarity is a perfectly natural juridical phenomenon while active solidarity is something quite artificial. An important illustration of this principle is afforded by the fact that a passive joint contract naturally produces solidarity, while an active joint contract naturally produces partition. Where we have a plurality of ~~in~~ debtors in a joint contract, the creditor has only a single interest to be satisfied, and he is entitled to look to all the debtors collectively and to each one individually for satisfaction of ~~this~~ interest in its entirety. Where on the other hand we have a plurality of creditors in a joint contract, each of them has a separate interest demanding satisfaction, and ~~partition~~ partition is the natural means of effecting a compromise among these conflicting interests: *fiunt concursu partes*. These statements require detailed consideration as regards both (a) the active joint contract and (b) the passive joint contract.²⁾

(a) If Maevius and Seius on the one side and Titius on the other make a contract by virtue of which T. ~~and M.~~ owes M. and S. a sum of money, but in which nothing is said as to the latter being entitled *singuli in solidum*, and we are asked what is the natural effect of this contract, we should probably reply that T. is ~~bound~~ bound to pay the total sum to M. and S. together, that is to say, he must by some means or other place the

¹⁾ cp. Levy, *Konk.* p. 178 ~~ff~~ f. These last statements ~~require~~ require a slight qualification in the case where a prestation-object is 'individualised' by the person of the creditor; ~~vide infra p. 154~~ ^{here} the exclusion of partition can only lead to simple solidarity; ~~vide infra p. 154~~.

entire amount under the common control of both M. and S., who can then divide it between them according to their respective interests. If T. pays the total sum to one of them, say M., on his (M.'s) account alone, he is not thereby freed from S.; for by the terms of the contract he was bound to M. and S. together, not to M. solely. S. can therefore still claim from T. his own proportionate share of the debt, and T. can claim from M. a refund of the amount overpaid.

Again if judicial proceedings become necessary we should naturally say that M. and S. ought to institute a single joint action, obtain a single joint judgment and carry through a single joint execution for the full sum. But suppose joint proceedings are out of the question, for example, one of the creditors, say M., is absent or refuses to concur in the institution or maintenance of the ~~proceedings~~ action, our natural sense supports the view that the other ~~the~~ creditor should be allowed to take separate action for the recovery of his proportionate ~~the~~ share of the debt.

All this amounts to saying that the right arising from an active 'simple' ²⁾ ~~xxxxxxxxxxxxxxxx~~ joint contract naturally leads to partition, and if it is desired to render the co-creditors entitled correally, the contract must be specially framed so as to achieve this result.

(b) On the other hand if under a joint contract M. and S. owe T. a sum of money, but they are not specially bound singuli in solidum, our impressions as to the

1) control e.g. by placing a bag containing the coin in the physical grasp of both M. and S.; by payment to their common agent; by making payment to one, say M., on behalf of both, M. having an express or implied mandate to act for S. in the matter.

2) simple here = either i.e. not containing any express statement that the creditors are entitled singuli in solidum or that they are entitled pro rata.

natural result are quite different.' There is certainly no necessity for M. and S. to join in making payment of the amount due, for T.'s interest is equally satisfied from whatever source the payment comes, - whether from M. and S. jointly, or from one of them alone, or from a third party intervening on behalf of both or of either. Again if judicial proceedings become necessary, ~~we might become necessary~~, we might be tempted to say that if possible T. ought to sue M. and S. together in a single joint action. But this carries us little way, for we immediately ask, will such an action lead to a single condemnation against M. and S. jointly or to separate condemnations against each pro rata, or to separate condemnations against each in solidum? Again if a single joint condemnation is pronounced, can the same be executed against either in solidum or must it be executed against each pro rata? Moreover, if a joint action against both is out of the question, say one of them is absent or is so hopelessly insolvent that it would be plainly useless to sue him, we feel bound to hold that the other may be sued alone. But this again carries us but little way, for we immediately ask, can this action be in solidum or must it be pro rata merely?

In order then to arrive at the natural effect of a passive simple joint contract, we must approach the subject from another side. M. and S. have promised to satisfy a certain interest pertaining to T., and they have promised to satisfy this interest in its entirety. If M. and S. are both present and both are solvent, it may be thought more equitable that T.'s claim should be directed against them pro rata. But if one of them, say M., be absent or insolvent, on what principle can the other, S., refuse to pay more than a proportionate share of the debt, and thus seek to transfer to T.'s shoulders the loss arising from M.'s default? S. has undertaken

is related that every under the entingquishes other?

to satisfy a certain/interest pertaining to T., and though he has assumed this liability in conjunction with M., and though under normal circumstances the burden may in equity be distributed between them, yet if M. makes default, T., we believe, must on a natural construction of the contract bear the entire burden himself. That is to say, a ~~joint~~ passive joint contract naturally leads to ~~solidar~~ correality, and if partition is intended this result must specially be provided for ~~in~~ the terms of the agreement.

The foregoing remarks are of a perfectly general nature and, as we shall presently see, technical considerations may militate against their application in the case of formal ~~contractus~~ negotia. Nevertheless this divergence in natural tendency between the two classes of joint contract is a fact of first rate importance and constantly asserts when not counteracted by other forces.

A further point is to be noted. In the case of passive joint contracts we have suggested the equity of granting the co-debtors a beneficium divisionis where both are present and solvent. As might be expected however the civil law admitted no such equitable device; if correality were established its effects must be carried out consistently, so that the creditor was entitled to exact the full prestation from either debtor under all circumstances. True this rule was altered by statute in the case of co-accessory debtors,¹⁾ but it remained intact right through the classical period in the case of co-principal debtors,²⁾ and all indications to the contrary

1) Sponsores and fidepromissores taken bound in Italy were accorded an 'eventual partition' by the ~~lex~~ Furia, and fideiussores (and mandatores?) a beneficium divisionis under Hadrian's rescript. The classical jurisprudence extended

the beneficium divisionis to certain parties who, though formally principal debtors, were from the material standpoint liable on behalf of another, e.g. joint mandatores pecuniae credendae (infra p. 313) and magistratus liable on the ground of failure to exact sufficient security from tutors (Levy, *Kuh.*, p. 304 ff.).

2) where liability was principal materially as well as formally; see previous note.

in the Digest must be attributed to the compilers.¹⁾

A creditor was however at perfect liberty to split up his claim among his correal debtors if he so chose; this right is everywhere taken for granted and no proof thereof need be adduced.²⁾ The ^{only} point that calls for remark is Levy's suggestion that only by aid of the maxims 'tot esse stipulationes quot ~~summae~~ summae sunt totque esse stipulationes quot species ~~sunt~~ sunt', was a creditor able to sue for part of a sum of money (or for part of a quantity of other fungibles or for a pro indiviso share of ~~a~~ a determinate species) due to him under a single stipulation. Applying this doctrine to the case of a correal stipulation, we have the result that if T. stipulates for X from M. and S. correally, and he sues M. for VI and S. for IV, the original correal stipulation must be deemed to consist of two separate stipulations one for VI from M. and another for IV from ~~M~~ S.

Though obviously it would be out of the question to argue the point at length here, I venture to express the strongest doubts as to the soundness of Levy's views on this matter. Any obligation having as its prestation object certa pecunia or certa res is by its nature capably^e of being divided 'vertically'³⁾ into any number of lesser obligations at the pleasure of the creditor without any necessity of ~~considering~~ the originating cause of obligation^{being deemed} so divided. Again if T. having an obligatory right to X against M., brings an actio certae pecuniae

¹⁾ ~~An exception must however be admitted in certain special cases where the co-debtors though formally principals, were materially accessories, e.g. magistrates liable on the ground of failure to exact sufficient security from tutors; Levy, Konk. p. 304 ff. As to the beneficium divisionis between co-principal debtors see Levy, ZSS. 37, p. 26 n. 2; also infra p. 238.~~

²⁾ Konk. p. 118

³⁾ Levy *op. cit.* p. 82, n. 8 to p. 81.

credita¹ thus: si paret Maevium Titio sex dare oportere,

could any one suggest that such action was not competent or that it consumed T.'s right to the whole X?

Assuredly not; T. having a right to X is by the nature of things entitled to sue M. for VI meanwhile, his claim for the remaining IV being preserved intact. Hence it seems altogether superfluous to invoke the maxims cited, which will outwardly mark the act as consisting not of

two or more separate stipulations but of a single joint one.

Now the simplest form of joint stipulatory act is no doubt as follows:

Form a (passive) Titius! Maevi, Sei, decem dari spondetis?

Maevius et Seius (simul): spondemus

Form b (active) Tute,
M. et S. (simul): decem dari spondetis?

T. : spondeo.

And in point of fact it has been conjectured that such was the original & form of joint stipulation.² No reliance can however be placed on this conjecture, for, as we know, simplicity is by no means a necessary characteristic of primitive legal forms. But in any event this was not the form employed in classical times for creating correality; ^{on the contrary} for ~~there~~ there is every reason to believe that the jurists held the same to be productive of partition.

The leading authority on this point is

D.(45.2)11.1,2. Papinian. XI respons.

§ 1 Cum tabulis esset comprehensum 'illum et illum centum aureos³ stipulatos' neque adiectum 'ita ut duo rei stipulandi essent', virilem partem singuli stipulationis videbantur.

§ 2 Et e contrario cum ita cautum inveniretur: 'tot aureos'

¹) *inst. iur.* p. 234

²) see e.g. Merkel, *Der römisch-rechtl. Begriff d. Novatio* (1892) p. 16; *op. Levy, Sponsio*, p. 39, n. 2.

³) Papinian presumably wrote 'aestercia'.

In the case of formless negotia the condition precedent to the establishment of a joint contract is purely ^{material} namely, that all the various parties shall ~~have~~ acted with a common intention in the matter.¹⁾ But when we come to a strictly formal negotium like stipulation, obviously a common intention is not enough; a form must be employed which will outwardly mark the act as consisting not of two or more separate stipulations but of a single joint one.

Now the simplest form of joint stipulatory act is no doubt as follows:

~~form a~~ (passive) Titius: Maevi, Sei, decem dari spondetis?

Maevius et Seius (simul): spondemus

~~xx~~ (active)

^{Titi,} M. et S. (simul): decem dari spondes?

T. : spondeo.

And in point of fact it has been conjectured that such was the original ~~the~~ form of joint stipulation.²⁾ No reliance can however be placed on this conjecture, for, as we know, simplicity is by no means a necessary characteristic of primitive legal forms. But in any event this was not the form employed in classical times for creating ^e correality; ^{on the contrary} ~~for this~~ there is every reason to believe that the jurists held the same to be productive of partition.

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§ 2 Et e contrario cum ita cautum inveniretur: 'tot aureos'³⁾

¹⁾ ~~vide infra~~ p. 239.

²⁾ see e.g. Merkel, Der römisch.-rechtl. Begriff d. Novatio, (1892) p.15; ~~cp.~~ cp. Levy, Sponsio, p.39, n.2.

³⁾ Papinian presumably wrote 'sestercia'.

recte dari stipulatus est Iulius Carpus, spondimus ego Antoninus Achilleus et Cornelius Dius', partes viriles deberi, quia non fuerat adiectum singulos in solidum spondimus, ita ut duo rei promittendi fierent.

It seems impossible to doubt the substantial genuineness of these two responsa, and it seems equally impossible to doubt that they give a true representation of the law as actually existing in Papinian's day.¹⁾ I cannot by any means accept Levy's ~~suggestion~~ ^{view} ^{opinion} ²⁾ that the word 'videbantur' suggests 'a view lying the past and moreover clearly betrays some uncertainty'. We must remember that under the classical law a cautio stipulatoria served merely to prove a contract clothed in the solemn oral form of question and answer; the formal constitutive cause of obligation lay solely in the verba used on the occasion of the oral solemnity.³⁾

Papinian is here asked for opinions on two cautiones which state respectively that two parties stipulated jointly and two parties promised jointly, ~~without~~ but which do not contain any words implying the constitution of a correal relation. His answers were to the effect that cautiones so framed could only be regarded as evidence of verbal contracts in which pro rata

shares had been stipulated for or promised. By means of the words 'stipulati videbantur' (= ἐπρωτῆσαντες ἐφείνοντο)

Papinian reports in somewhat Grecized form his own previous decisions as to the evidential effect of the words

- 1) We have of course no guarantee that § 2 immediately followed § 1 in Papinian's Responsa, and the compilers may have made some formal adjustments of the text. As the §§ stand, apparently 'videbantur' in § 1 must ~~also~~ serve as the principal verb of § 2 likewise, so that in the first case it has a personal subject 'singuli', and in the second an impersonal subject 'partes viriles'; but such an inelegance is hardly to be expected of Papinian; we also note the use of the singular 'virilem partem' in § 1 and the plural 'partes viriles' in § 2. It seems more probable therefore that § 2 did not immediately follow § 1 in Papinian's Responsa, and that 'partes viriles deberi' was originally governed by a 'respondi'.

- 2) Konk. p. 180.

- 3) see Riccobono, ZSS. 35, p. 243 ff.

of the ~~document~~ first document.

But what is the inference with regard to the form of the oral stipulation? Plainly this, that if the framework of a stipulation is simply joint and no more, the result will be partition; if correality is intended, it must be expressly provided for. But the clearest example of a stipulation simply joint and no more would seem to be form a above; hence we conclude that this form produces partition.¹⁾

How then is correality to be expressly provided for in a stipulatory formula? We have no difficulty in conjecturing how this question should be answered. The interrogatory must be framed 'distributively', that is to say, each of the several debtors must be asked whether he will render the whole prestation to the common creditor, each of the several creditors must ask the common debtor whether he (the debtor) will render the whole prestation to him (the particular creditor).

Now doubtless an interrogatory consisting of a single question may be distributively framed thus:

form b (passive) T.: Maevi, Sei, uterque^e vestrum decem dari spondet? or
singuli decem dari spondetis? or the like.

(active) M. et S. (simul): Titi, utrique nostrum decem dari spondes?
or nobis singulis decem dari spondes?
or the like.

But this form of distributive interrogatory, though its efficacy cannot be denied, was not that commonly employed, so far as our evidence goes. The form actually used in practice consisted of two questions each put to, or by, one of the several debtors or creditors individually, the second question being connected with the first by means of some inflexion of idem or is, so that both were shown to be parts of one and the same interrogatory

Idem and is I consider to have precisely the same effect here (cp. Levy, Sponsio, p. 19ff.), but I do not believe (ctd ~~xxxxxxx~~ at foot of next page)

The Proculian view
of a stipulation sibi
alii dari rendered
stipulation entitled merely
(fac. III. 102)
rate, corresponds
with the rule that
simple joint stipulation
does partition (cp. 2)
this, 255., 32. p 22).

seems highly probable that the ~~late~~ classical jurists generally
adopted the Proculian view, otherwise Justinian would hardly
have given it the preference over the more equitable and common-sense view of the Sabinian
school who held the stipulation entitled to the whole; see further p 69 ff. infra.

thus:

form c (passive) T.: Maevi, decem dari spondes?

(active) T.: Sei, eadēm decem (ea decem, idem, id) dari spondes?

(active) M.: Titi, decem dari spondes?

S.: Titi, eadem decem (etc) dari spondes?

This form of distributive interrogatory with double questions was greatly to be preferred to the previous one^(form b.) on the ground of distinctness, and for this reason I venture to regard it as the original and orthodox formula of the civil law, any other formula being admitted merely through tolerance of the classical jurisprudence.

As regards the framework of the response, the essential point is that 'acquiescence' in the terms of the interrogatory must clearly be expressed. The interrogatory being distributively framed, it would appear that a simple non-distributive response:

form d (passive) M. et S. (simul): spondemus

(active) T.: spondeo,

is sufficient. But this form, it seems clear, was not that commonly employed. In the passive case two separate answers were in practice given, which answers apparently need not be connected by an inflexion of idem or is, their relation to the same interrogatory being a sufficient connection; in the active case the common form appears to have been a single answer in distributive form; thus:

(ctd from foot of previous page)

that their insertion had any immediate connection with the exclusion, as is commonly supposed (see, e.g. H. Krüger, ZSS. 22, p. 217). The distinction between idem = is (the same as something already mentioned) and idem = unus (one and the same) should be ~~noted, though it is~~ noted.

The precise function of idem (is) and the effect of its omission will be considered when we come to deal with cumulation; infra p. 61/62.

orm e (passive) M.: spondeo

S.: spondeo

(active) T.: utrique vestrum dare spondeo or

vobis singulis dare spondeo or the like.

A double response in the active : Maevi, spondeo - Sei, spondeo, would however be quite unexceptionable. ~~in~~ By means of these forms 'acquiescence' in the distributive interrogatory is very clearly expressed.¹⁾

Thus we arrive at the common form of correal stipulation substantially ^{or}pretrayed in Inst.III.16 pr.:

orm f (passive) T.; Maevi, decem dare spondes?

Sei, eadem decem dare spondes?

M.: spondeo

S.: spondeo

(active) M.: Titi, decem dare spondes?

Titi, eadem decem dare spondes?

T.: utrique vestrum dare spondeo.

If our speculations be sound we have accordingly two ^{is} distinct forms of joint stipulations:

- (i) the simple joint form ~~xxxxxform~~ (form a) with non-distributive interrogatory, which produces partition, and
- (ii) the correal joint form (forms b - f) with distributive interrogatory, which produces correality and which we call the correal stipulation.

It will be observed that in the foregoing exposition partition appears as the normal result of a passive, as well as of an active, joint stipulation; in both cases

¹⁾ If the interrogatory be non-distributively framed, the fact of the response being distributively cannot, it is thought, render the stipulation as a whole distributive so as to give it correal effect, for the purpose of the response is merely to express acquiescence in the interrogatory; indeed a distributive response given to a non-distributive interrogatory might render the whole act null and void on the ground of 'non-acquiescence'; cp. infra p. 91 ^{1/2}.

opinion, tenable, namely, that the passive joint stipulation ~~xxxxx~~ simply framed was held to produce partition by way of analogy to the active joint stipulation.

(ctd at foot of next page)

2) (note at foot of next page)

3) vide infra p. 24

alike correality is an abnormal result which calls for the use of a special distributive formula.¹⁾ But we have already seen that a passive joint contract naturally leads to correality; wherefore then this artificial departure from the natural tendency of juridical ^{doctrine} thought? The only possible explanation seems to be that the rule in favour of partition formed part of the old civil law tradition, being established long before the days of mature/juristic ~~reflex~~ reflection.²⁾ The co-debtors have bound themselves collectively to render a certain prestation; hence, it was naïvely concluded, individually each can owe only a part of this prestation.³⁾

Be this as it may, the position seems clear that as regards the antithesis ~~correality~~ ^{solidarity} v. partition the active and the passive joint stipulations were governed by precisely the same rules. Yet signs are not wanting that even here the divergency in natural tendency sometimes made itself felt; an excellent example is found in the cautio damni infecti.²⁾ It is however only when we get into the realm of formless negotia that we see the natural tendency of the two classes of joint contract operating respectively without restraint

Finally we have to note that in practice it is hardly conceivable that parties should employ a joint form of stipulation, active or passive, unless they intended to produce correality; if they intended to produce partition their obvious course was to enter into separate stipulations. Thus the whole doctrine that a simple joint stipulation leads to partition comes to be little more than a pitfall for the unwary. The case in which the antithesis ~~correality~~ ^{solidarity} v. partition assumes vital importance is where a creditor or debtor dies leaving co-heirs, but this case does not fall within the scope of our present enquiry.³⁾

1) Another explanation which may suggest itself to some is not in my opinion, tenable, namely, that the passive joint stipulation ~~was held to produce partition~~ simply framed was held to produce partition by way of analogy to the active joint
(ctd at foot of next page)

2) (note at foot of next page)

3) vide supra p. 24.

- (1) Papinian. D. (45.2) 11.1, 2 has already been considered.
 (2) Inst. III. 16 pr., 1 will be considered later.²⁾
 (3) D. (45.3) 29 Paul. LXXII ad edict.

Si communis servus sic stipulatus sit: 'decem illi domino, eadem decem alteri dare spondes?', dicemus duos reos esse stipulandi.

Much of the Digest-title de stipulatione servorum (45.3) is concerned with the case of a stipulation by a servus communis, and the analogy of this case with that of an active joint stipulation is apparent. The general principle clearly was that if a common slave stipulated on behalf of both masters, each of the latter acquired a pro rata right, though in certain cases a doubt existed as to whether such right ~~was~~ was pro parte virili or pro parte dominica.³⁾ On the other hand, as ~~the~~ our present fragment shows, it was perfectly well recognised that a common slave might, by using a distributive simplex formula:

decem Maevio, meo domino, eadem decem Seio, meo domino, dari spondes? ⁴⁾ ~~on the like~~

on the like

confer correal rights on his masters.

But the distributive simplex ~~interrogatory~~ ^{formula} just quoted clearly corresponds to the distributive joint ~~interrogatory~~ ^{formula}:

M.: decem dari spondes? S.: eadem decem dari spondes?

(ctd from foot of previous page)
 stipulation where the natural result was partition. The passive joint stipulation must, I believe, be much more ancient than the active (~~active~~ vide supra p. 22), so that any argument from the latter to the former is excluded.

²⁾ Note 2) to previous page. Levy, Konk., p. 180f. I cannot here enter into a discussion of this case. The reader is referred to Lenel, Edict., p. 527 (where the formula of the cautio is given); Paul. D. (39.2) 27; (11.1) 20.2.

- 1) supra p. 37 ff.
 2) infra p. 66 ff., 127 ff.
 3) ~~see~~ compare Ulpian, h.t. 7 pr. and Pomponius ~~h.t.~~ h.t. 37.

4) The omission of 'eadem' would not, I believe, make any practical difference to the result; vide supra p. 62

Likewise the non-distributive simplex formula:

Maevio et Seio, meis dominis, decem dari spondes? ~~or~~

the like, which produced partition, clearly corresponds to the non-distributive joint formula:

M. et S. (simul): Titi, decem dari spondes?

A fresh piece of evidence is thus obtained that a simple joint stipulation produces partition, a special distributive form being required in order to produce correality.

4
(5)

D.(45.2)8 Ulpian. I respons.

His verbis: 'eaque praestari stipulanti tibi spondimus'

[interesse quid inter contrahentes actum sit: nam si duo rei facti sint] eum qui absens fuit non teneri, praesentem autem in solidum esse obligatum, [aut si minus, in partem fore obstrictum.]

Here, as in Papinian. D.(45.2)11.2, we have a cautio stipulatoria purporting to record a passive joint stipulation, but without any words indicating that the debtors were taken bound singuli in solidum. Prima facie therefore we must, applying Papinian's decision, treat the cautio as evidence of a joint stipulatio in non-distributive form:

T.: Maevi, Sei, decem dari spondetis?

with partition as the result.

The case in our present fragment however presents a speciality of grave consequence. One of the two parties, M. and S., mentioned in the document as joint promisors, say M., is proved not to have been present when the contract was concluded, and hence he cannot have taken part in the oral solemnity. In other words the cautio stipulatoria is proved to be false in a certain respect. No joint stipulation between T. on the one side and M. and S. on the other can have taken ~~place~~ place, and the document must be construed as attesting merely a simplex stipulation by T. from S. who admittedly was present. But clearly, under the classical

law, M., having taken no part in the verbal stipulation, is not bound at all, for the ^{originating} cause of obligation is the oral solemnity and that alone. The question then arises, is S. bound in solidum or pro rata?

Now consider how this question is solved in the fragment as it stands. ^{it is held,} We must enquire what the parties really intended by the words quoted ~~by~~ from the document. If they intended to constitute M. and S. correal debtors, S. is liable in solidum; if they did not, he is liable only pro rata. That such a decision never proceeded from the pen of Ulpian we may assert with the utmost confidence. Here the document is plainly assumed to have per se a dispositive value, and must be interpreted so as to bring out the real intentions of parties. The clausula stipulatoria itself is indecisive on the question of correality or partition, and accordingly we have to construe it in the light of ~~the remaining contents of the~~ remaining contents of the document and any other relevant facts showing the parties' intentions in the matter. If it is thus ascertained that ^{solidarity} correality was intended, then obviously S. remains liable in solidum, though M. is detracted. All this, as we shall see later, is perfectly good Justinianian law, but it certainly is not classical.

Again the fragment bristles with formal defects: the phrase 'inter contrahentes' is characteristically Tribonianian; the construction 'his verbis...interesse quid...actum sit', 'his verbis' being governed by ²⁾ 'actum sit' is harsh; after 'nam' ^{ratio nota, not obliqua,} ~~the indic., not the accus.~~ and ~~infin.~~ ^{infinitive} is called for; the concluding passage 'aut si... obstrictum' is inelegant in the extreme.

If however we delete the passages 'interesse... sint' and 'aut... obstrictum', we get what was almost certainly Ulpian's decision, namely, that M. is not bound

¹⁾ *infra* p. 218 ff.

²⁾ Beseler II p. 70 f., III p. 62

and conversely if not
solidarity was
intended, S. remains
liable in solidum
but partition
is intended, S.
remains liable pro
rata in the same
way.

but S. is bound in solidum. Though, assuming both M. and S. to have participated in the oral solemnity, the words of the document must be interpreted as evidence of a simple joint stipulation resulting in partition, yet when it is proved that actually the stipulation was between T. and S. alone, the whole prestation promised is due by the latter. As to the soundness of this decision, no one will, I venture to think, entertain any doubt.

- (5) D. (45.2)4 Pomponius XXIV ad Sabin.
¹⁾<->[Duo rei]²⁾<->³⁾promittendi <->⁴⁾sive ita <->⁵⁾interrogati 'spondetis?', respondeant <->⁶⁾'spondeo', aut <->⁷⁾'spondemus', sive ita <->⁸⁾interrogati 'spondes?' respondissent <->⁹⁾'spondemus', recte obligantur.

-
- ¹⁾ Sabinus ait
²⁾ duos reos
³⁾ ita interrogandos esse ut a singulis tota res stipulatori
debeatur, sed parvi interesse utrum simul interrogentur
vel respondeant an separatim. quamvis ~~autem~~ igitur ita
separatim interrogati 'spondes?' respondere separatim
'spondeo' soleant, tamen
⁴⁾ simul
⁵⁾ singuli
⁶⁾ separatim
⁷⁾ simul
⁸⁾ 'aut spondemus' del. Mommsen et Lenel (Pal. II, col. 134)
⁹⁾ separatim
¹⁰⁾ simul

It seems impossible now to decide with any certainty wherein the original signifacance of this awkward fragment lay .¹⁾ If we delete the words 'aut "spondemus"' as a gloss, we seem to have a reference to the rule that the response must be 'congruent' with the interrogatary : this rule of 'congruence' is not broken where the debtors reply in the singular to a question put in the plural and vice versa. Emendations of this sort are however of quite an arbitrary nature, and we are bound to ask ourselves whether no other interpretation is possible.

Taking the text of the fragment as it stands, we at once note the fact that three cases are mentioned: (i) where the creditor puts a single question in the plural (spondetis?) and the debtors give separate answers in the singular (spondeo);²⁾ (ii) where the creditor puts a single question in the plural (spondetis?) and the debtors give a single answer in the plural (spondemus); (iii) where the creditor puts separate questions in the singular (spondes?) and the debtor gives a single answer in the plural (spondemus).³⁾ Nothing however is said of the fourth case where the creditor puts separate questions in the singular (spondes), and the debtors give separate answers in the singular (spondeo).⁴⁾

Is it not possible that here we have the clue to the original purport of the fragment?

1) *nd. l. p. 90*

2) it is hardly likely that a single answer 'spondeo' given by both speaking together is referred to.

3) *with info. Justinian altered the law on the point of April 99 of the year 529, vide infra p. 237f.*

May not Pomponius have been dealing with the necessity of a distributive form in order to exclude partition? May not the substance of his argument have been that though the form ~~of~~ with double question and double answer was the one regularly used, yet any of the other three forms referred to would suffice? If we adopt this suggestion we are bound to give the single question 'spondetis?' a distributive force, which can easily be done by introducing 'singuli'.

In the notes I have ventured an altogether conjectural restoration based on the foregoing suggestion. The structure of the fragment as it stands cannot be described as particularly elegant, and I think it possible that Pomponius commenced with a quotation from Sabinus and then gave explanations of his own.

Assuming that Pomponius's argument was such as I have supposed, it is easy to understand why the compilers mutilated the same. Under the Justinianian law, as existing at the time when the Digest was compiled,¹⁾ the question whether a joint stipulation produced correality or partition depended, not on any formal words used, but on the real intentions of parties.²⁾

Further discussion of this fragment is accordingly

(6) ~~D. (45.2)2. Iavolen. III ex Plaut.~~

Cum duo eandem pecuniam aut promiserint aut stipulati sunt, ipso iure et singuli in solidum debentur ~~et singuli debent~~ et singuli ~~debent~~ debent: : ideoque petitione acceptilatione unius tota solvitur obligatio.

As this fragment stands, it seems to contain a general statement that where two parties

~~stipulate for~~

see further *infra* p. 219.

1) ~~vide *infra*.~~ Justinian altered the law on this point
§ 1 of the law 99 of the year 539; *vide infra* p. 237f.

(6) D. (45.2)2 Javolen. III ex Plaut.

Cum duo eandem pecuniam [aut promiserint aut]
[stipulati] <~>¹⁾ sunt, ipso iure [et] singuli in
solidum [debentur] <~>²⁾ [et singuli debent] :
ideoque petitione acceptilatione³⁾ unius tota
solvitur obligatio.

As this fragment stands it seems to contain a general statement that when two parties promise or stipulate for the same sum of money, they are ipso iure correal ~~creditors~~ debtors or ~~debtors~~ creditors; nothing is said as to the necessity of a joint stipulation distributively framed. The hand of the compilers is however here evident. The final clause 'ideoque... obligatio' makes it plain that Javolen only dealt with the active relation, and we must therefore delete all references to the passive relation⁴⁾. The subjunctive 'promiserint' standing side by side with the indicative 'stipulati sunt' in the same clause, is another mark of interpolation; again the expression 'singuli in solidum debentur' is clearly impossible.

But what may Javolen have written? I venture to think that he dealt with the case of two adstipulatores acceding to the same principal obligation; as we know, the compilers frequently altered 'adstipulari' to 'stipulari'.⁴⁾ Further discussion of this fragment is accordingly reserved for my study on Accessoriality.

1) ~~adstipulati~~ adstipulati

2) actionem habent

3) Mommsen: acceptilatione^{ve}

4) Heumann-Seckel, s.v. stipulari, p. 556.

The classical law of novation by stipulation may briefly be explained by means of the following illustration: An obligation has already been constituted between T. as creditor and M. as debtor for the sum of X, the manner of constitution being immaterial. T. now stipulates from a third party S., thus:

T.: Sei, (~~eadem~~ eadem, ea) decem quae Maevius mihi debet (spopondit, promisit, quae Maevium mihi dare oportet ex causa furti, etc), dari spondes?

S.: spondeo.

Or a third party S., with T.'s authority, stipulates from M., thus:

S.: Maevi, (eadem, ea) decem quae Titio debes (etc) dari spondes?

M.: spondeo.

In the first case (form g) M. is freed and S. steps into his ^{place} as sole debtor; this we call passive novation.

In the second place (form h) T.'s right is extinguished and S. steps into his place as sole creditor; this we call active novation.

The formal requisites of novatio therefore are (i) diversity of constitutive cause; the obligation to be novated must first be constituted and then the novatory obligation must be constituted ^{by} a fresh cause; and (ii)

1) These words have merely a demonstrative value and are not

in any way necessary; the identifying factor is ~~the clause~~ the clause 'quae M. mihi debet'. '(Idem, id) quod' may be substituted for '(eadem, ea) decem quae,' but proof will then be required as to how much M. did actually owe T. As to the equivalence of idem and is vide infra p. 39 n. 1.

2) This material condition is clearly essential because T. cannot be deprived of his right without his consent; if it is not fulfilled, the second stipulation will either be void or will produce an obligation related cumulatively to the pre-existing obligation; we cannot here discuss under what circumstances the one or the other of these results will take place.

51 { 8 ctd

identification of the object of the second obligation with that of the first; properly speaking this identification should be express (quae/^{Maevius} mihi debet, quae Titio debes), but under certain circumstances it will be implied by law.

If these requisites are fulfilled, novation takes place ipso iure, and the parties cannot, we believe, prevent this result by introducing into the stipulatory formula any modifications which the law itself does not ~~recognise~~ recognise. Suppose, for example, T. were to stipulate thus: Sei, eadem decem quae Maevius mihi debet, tu quoque (or praeter Maevium) dari spondes?, in our opinion this stipulation would be legally void.¹⁾ The intention of the parties here is to add S. as a co-debtor with M., but such intention is futile under the civil law, because of the legal rule that a promise by S. of 'idem quod M.' debet novates the pre-existing obligation of M. The parties have introduced into a formula to which the law attributes novatory effect words designed to prevent this effect, but the law frustrates such design by nullifying the whole transaction.²⁾

Obviously the correal stipulation, being designed to create two co-existing obligations, stands directly opposed to the novatory which creates a new obligation to take the place of one already constituted. The basis

¹⁾ contra (apparently) Levy, Konk., p. 176 n. 5

²⁾ We cannot here attempt to prove the foregoing propositions or to enquire how far, if at all, the mature classical jurisprudence admitted derogations from civil law principles. In my future treatise on Accessoriality I shall show cause for believing that the classical jurisprudence admitted such a derogation in order to allow a sponsor or fidepromissor to be taken bound separately from his principal; cp. meanwhile my restoration of D. (45.2) 3 pr. infra p. 53. As to the post-classical and Justinianian law of novation vide infra p. 212.



of the distinction is above all doubt. While ~~the~~ novatory and the novated ~~stipulation~~ obligations necessarily arise from different ~~stipulation~~ constitutive causes, the two co-existing obligations making up a correal relation arise from one and the same constitutive cause, namely, a single joint stipulation.

This contrast enables us to see clearly wherein the jointness of a stipulatory act with a plurality of parties on the one side or the other consists, namely, in the requirement that the interrogatory, addressed to or by the various parties, must be complete before any response is given. Of course when the interrogatory ~~comprises~~ comprises merely a single question, the fulfilment of this condition is a matter of course, and the only case which we have to observe is where the interrogatory is divided into two or more questions. Here if one question is put and the answer given thereto before the other question is put, then, even though the other question and answer follow at once, the result is two

- 1) simplex stipulations and not a single joint one. All
- 2) this is explained with perfect lucidity in Inst.III.16 pr. ¹⁾

- 3) As regards the response, even though the answers ~~be given separately~~
- 4) be given separately the one after the other, the second
- 5) answer cannot possibly have any novatory effect, because
- 6) it relates to a question put before the first answer was
- 7) given. The two answers relate to one and the same
- 8) interrogatory; hence the fact of their not being given
- 9) precisely at the same moment is ignored and the two
- 10) obligations are deemed to arise simultaneously.

1) infra p. 66 ff.

(1) Inst. III. 16 pr., 1 will be considered later. ¹⁾

(2) D. (45.2) 3 pr. Ulpian. XLVII ad Sabin.

α. In [duobus reis promittendi] ¹⁾ $\langle \sim \rangle$ frustra & timetur novatio

β. [nam licet ante prior responderit posterior] etsi ex intervallo accipiatur [consequens est dicere priatnam obligationem durare et sequentem accedere:]

γ. [et] ²⁾ parvi refert simul ³⁾ $\langle \sim \rangle$ [spondeant] ⁴⁾ $\langle \sim \rangle$ an separatim ~~promittant~~ ⁵⁾ [permittant], cum [hoc actum inter eos sit] ⁶⁾ $\langle \sim \rangle$ ut [duo rei] ⁷⁾ $\langle \sim \rangle$ [constituantur] ⁸⁾ $\langle \sim \rangle$ [neque] ⁹⁾ $\langle \sim \rangle$ ulla novatio [fiat] ¹⁰⁾ $\langle \sim \rangle$.

Every one will admit that this principium has suffered greatly at the hands of the compilers, and in my opinion it originally referred, not to the relation of duo rei promittendi at all, but to that of principal

1) sponsore vel fidepromissore postea adiciendo

2) nam (from β.)

3) cum reo

4) spondeat

5) vel fidepromittat

6) ita interrogetur

7) sponsor vel fidepromissor

8) ~~constituantur~~

9) neve

10) fiat

~~hancakxRakxXifxXxakxXifxXxaddxthexfokkewkxx~~

1) *inf. p. 66, 127.*

debtor and sponsor or fidepromissor. ¹⁾

In the first place I observe that almost all the ~~far~~ fragments we possess from the forty seventh book of Ulpian's Sabinus commentary have some relation to suretyship, and there is apparently a close connection between this pr. and D.(46.1)6. ²⁾ In the second place any suggestion that a classical correal stipulation could result in novation is absurd. In the third place the opening words of period α. 'in ~~du~~^{bus} reis promittendi' standing alone are harsh, - a gerundive 'constituendis' or 'faciendis' should have been added. In the fourth place the statement in period β. that solidarity could be created by ~~the addition of a stipulation~~ the accession of a fresh obligation to one already constituted is now universally admitted to be interpolated in accordance with Justinian's constitution C.(8.41(42))8. In the fourth place period γ. as it stands is obviously impossible and there can be little doubt that the compilers have here made an exceedingly clumsy adaptation of Ulpian's original text. Finally the whole ~~pr.~~ pr., however inelegant its diction, is perfectly intelligible from the standpoint of the Justinianian law, as we shall see later. ³⁾

Believing as we do that Ulpian's original text related to sponsio and fidepromissio, we shall ~~reserve~~ ^{reserve} detailed discussion thereof for our treatise on Accessoriaty. We have however noted meanwhile certain suggested restorations which, if substantially well-founded are of immense importance for a proper understanding of the institutes of sponsio and fidepromissio.

¹⁾ ~~Lenel~~ Lenel, Pal. II col. 1183, adds the following note:
similis quaestio oritur si postea adpromissor adiciatur, cum expromissio isdem verbis fieri possit atque adpromissio,

²⁾ see Lenel l.c. and Kruger Dig.

³⁾ infra p. 219.

(3) D. (46.1)43 Pomponius VII ex var. lect.

α. Si a Titio stipulatus [fideiussorem]¹⁾ <~> te ~~xxxxxxxx~~²⁾
acceperim, deinde eandem pecuniam ab [alio]³⁾ <~> stip-
ulatus alium [fideiussorem]⁴⁾ <~> accipiam <->⁵⁾

β. <->⁶⁾

γ. <->⁷⁾ [confideiussores]⁸⁾ <~> [non] erunt <-> [quia]⁹⁾ <~>
diversarum stipulationum [fideiussores]¹⁰⁾ ~~xxxx~~ sunt.

Undoubtedly this fragment *prima facie* conflicts with our doctrine regarding novation. Naturally interpreted it means that if I first stipulate from T.: decem dari spondes?, and take you bound as fideiussor, and then I stipulate from a third party M.: (eadem) decem quae Titius mihi ~~xxxx~~ dare spopondit, dari spondes?, and take a fourth party S. bound as fideiussor, in such case you and S. are not co-fideiussors (for the purpose of *beneficium divisionis*), because you are fideiussors of different stipulations. But according to our theory

1) sponsore^m

2) eodem

3) sponsorem

4) te non liberari ~~xxxx~~ constat

5) nam duo pluresve sponsores eiusdem debiti separatim

6) accipi posse procul dubio est

7) proinde

8) ~~xxxxxx~~ consponsores

9) ita ut per legem Furiam inter eos dividatur obligatio

10) quamquam

11) sponsores

1) ~~xxxxxxxx~~ Sponsio, p. 180 ff.

2) vide infra p. ~~xxxx~~ 194

the stipulation from M. must novate the ~~pre-existing~~ pre-existing obligation of T., and hence must free you, as T.'s fideiussor, altogether. The whole decision thus becomes meaningless.

If we accept the fragment as genuine, the only way to get over the difficulty is that suggested by Levy.¹⁾ That is to say, we must suppose the stipulation from M. to have run simply; ~~decem dari spondes?~~ so that formally we have two quite independent obligations decem dari between me and T. and between me and M. respectively. But we must further suppose that materially both these obligations are designed to satisfy the same economic interest on my part; for example, I have made a single loan of X to T., and the subsequent promise by M. was intended merely to serve as a further security for this loan. In such a case the praetor will certainly prevent me from recovering more than a single sum of X, so that a legal cumulative relation is reduced to equitable solidarity.²⁾ What Pomponius decides is that no beneficium ~~divisionis~~ divisionis can be granted to fideiussors who accede to different obligations standing in a merely equitable solidary relation to one another.

Though the foregoing interpretation cannot be pronounced impossible, to my mind it appears extraordinarily improbable. I cannot believe that Pomponius would here ~~in dealing with stipulation~~ have used the expression 'eandem pecuniam' otherwise than to denote a sum of money identifies with another sum by means of the stipulatory formula: ~~decem dari spondes?~~ (eadem) decem quae Titius mihi dare spondit, and such identification, according to our theory, produces novation.

¹⁾ ~~vide infra~~ Sponsio, p. 160 ff.

²⁾ vide infra p. 194 ff. 196 f.

In my opinion then either this fragment must be pronounced interpolated or our theory must be revised, and I have little hesitation in deciding in favour of the former alternative. In the first place it is to be observed that the fragment is perfectly intelligible from the standpoint of the Justinianian law, which we know to have differed strongly from the classical system in the matters of solidarity, suretyship and novation, and this fact at once arouses suspicion. In the second place we note the inelegancy of 'erunt' and 'sunt' standing in such close proximity each at the end of its clause, and also the fact that both these verbs should be in the second person plural. In the third place experience teaches us always to be on the look-out for a substitution of fideiussio for sponsio (and fidepromissio), and when a passage purporting to deal with the former is in any way doubtful the chances of this substitution are greatly magnified.

In point of fact I believe that Pomponius's original argument must have referred to the case where I first stipulate from T. and take you bound as sponsor, and then I stipulate again for the same prestation from the same T. and take another party bound as a second sponsor. I have suggested in the notes a possible restoration, but detailed consideration of this case must be reserved for my study on Accessoriality.

a debitore
ita ut uxor a marito liberetur
1) vide infra p 220.
et vel iussu esse debitorum ab uxore iure non
liberari
9/10/11 liberat ne otiosum nolum

- (4) D. (46.2)8.5 Ulpian. XLVI ad Sabin.
 α. Si <->¹⁾ ab [alio] <~>²⁾ [promissam] <~>³⁾ sibi [dotem] <~>⁴⁾
 maritus <->⁵⁾ [ab uxore] <~>⁶⁾ dotis nomine stipulatus sit,
 non duplari dotem sed fieri novationem placet <->⁷⁾

β. [si hoc actum est: quid enim interest ipsa an alius
 quilibet promittat?]

γ. <->⁸⁾

δ. quod enim ego debeo si alius promittat, [liberare me
 potest] <+>⁹⁾

ε. [si novationis causa hoc fiat: si autem non novandi
 animo hoc intervenit, uterque quidem tenetur, sed
 altero solvente alter liberatur]

ζ. non tamen si quis stipuletur quod mihi debetur
 aufert mihi actionem, nisi ex voluntate mea ~~stipuletur~~
 stipuletur.

η. [liberat autem me is qui quod debeo promittit, etiamsi
 nolim.]

1) pecuniam quam alius uxori debebat

2) illa

3) dictam

4) doti

5) iniussu illius

6) a debitore

7) ita ut uxor a marito liberetur

8) sed verius est dicere debitorem ab uxore iure non
 liberari

9) (from η) liberat me etiamsi nolim

This paragraph has evidently undergone fundamental alterations at the hands of the compilers.

Only the general statements in periods δ - η properly fall within the scope of the present treatise.

That period ξ is entirely due to the compilers no one at the present will be inclined to dispute; for it states precisely the combined result of Justinian's constitutions C. (8.41(42))8 and (8.40(41))28.¹⁾ Furthermore in my opinion it is practically certain that the conclusion of δ was 'liberat me etiamsi nolim', and that Ulpian's argument ~~end~~ ended with ζ . The antithesis plainly is between passive novation which takes effect irrespective of the wishes of the original debtor, and active novation which requires the original creditor's consent. The ~~xxxxxxx~~ compilers, in order to prepare the way for ξ , have changed the termination of δ to 'liberare me potest', and they have further constructed a new period η at the end of the paragraph to set forth the rule that the original debtor's consent was not necessary to passive novation.

As the 'enim' in δ shows, the statement of the contrast between active and passive novation was intended to ~~xxxxxxx~~ serve as motive for the preceding decision in periods α and β . But in these latter periods also the compilers' hands are manifest. The words 'si hoc actum est' in β are now generally to be interpolated on the ground of C. (8.41(42))8, and I have no hesitation in deleting ~~the~~ as well the rhetorical question which makes up the remainder of the period. Again as regards α , there can be little doubt that the ~~x~~ words 'promissam sibi dotem' originally ran 'dictam sibi doti', and ~~if this be so~~, there can be equally little doubt that the compilers have ^{in other respects} ~~fundamentally~~ recast Ulpian's statement

¹⁾ vide infra p. 220, 231.

of facts. Further discussion of this paragraph properly belongs to treatises on dotal law and novation; my proposed restorations^{of periods & such} are ^{here} merely given for what they are worth.

Form 1.

By cumulation we mean the co-existence of two obligations in such a relation that no fact bearing on the one alone has an 'extensive' action on the other. From the standpoint of the civil law, this signifies that litiscontestatio under the one has no consuming effect on the other; without extensive process-consumption the civil law/~~did~~ not admit/~~extensive~~ solutio-consumption.¹⁾ But, as we shall see later, the classical jurisprudence did recognise a relation in which solutio, but not litiscontestatio had extensive ~~a~~ consuming effect, *in other words a relation of simple solidant*

In this section we have to consider what is the element in the correal stipulation which excludes cumulation. The distinction between generic and specific²⁾ prestation-objects must here be taken into account.

A. Obligations with generic prestation-object.

Let us consider in the first place the ordinary form of joint interrogatory with double questions:³⁾

form j.

T.: Maevi, decem dari spondes?

Sei, eadem decem dari spondes? etc

It is commonly said that cumulation is here excluded by the inflexion of idem (eadem),⁴⁾ and the literal accuracy of this statement is undeniable. X 'Eadem' expressly identifies the X mentioned in the second with the X ~~mentioned~~ mentioned in the first, and two cumulative obligations can never have one and the same generic prestation-object. Otherwise stated, the express identification of ~~the~~ the two equal generic prestation-objects ipso facto excludes cumulation.

The matter does not however end there. Let us now consider ~~an~~ joint^{joint} interrogatory with a single distributive question;

¹⁾ infra p. 152 ff.

²⁾ vide supra p. 16

³⁾ for the sake of brevity ^{now} choose one example from the former case alone.

⁴⁾ is (ea) ; vide supra p. 39 n. 1.

rm K.

T.: Maeui, Sei, uterque vestrum mihi (eadem) decem

dare spondes?

(una)¹⁾

Suppose 'eadem' be omitted, can it be said that M. and S. are liable cumulatively? The answer must, I believe, be a decided negative. Why? Simply because a single

~~stipulation~~ stipulatory act can never produce obligations in solidum²⁾ which are cumulatively related. The term 'eadem' therefore, if inserted, has no special force at all.

So in D. (45,3)29³⁾, the stipulation by the common slave would, I believe, have precisely the same effect if the 'eadem' before the second 'decem' were omitted, though its elegance would be somewhat impaired. A common slave cannot by a single stipulatory^{act} confer cumulative rights in solidum on his co-owners, and the 'eadem' simply shows that he has no intention of attempting such an impossibility.

Returning now to ~~the~~ form j. we ask what would be the effect of the omission of 'eadem' in the second question?⁴⁾ In my opinion we must ~~reject~~ reject any theory that ~~this~~ this omission would render M. and S. liable cumulatively. What^{it}/actually does is to destroy the formal connection of the two questions as parts of one and the same interrogatory, with the result that the stipulatory act becomes legally null and void, either in whole or in part.

Thus, suppose the stipulation to run:

T.: Maeui, decem dari spondes?

Sei, decem dari spondes?

M. a spondeo

S.: spondeo.

Here between the question to M. and his answer there

1) *supra* p. 39 n. 1

4) We have already dismissed the idea that this term has anything directly to do with the exclusion of partition, so that the effect of its omission cannot be to render M. and S. liable pro rata merely; *supra* p. 39 n. 1.2

3) *vide supra* p. 43.

2) pro rata obligations are cumulatively related; *vide supra*

intervenes a formally ~~un~~connected question to S., which latter question constitutes an aliud negotium rendering M's promise legally void on the ground of non-continuity of act. On ~~xxx~~ the same ground S.'s promise is legally void through the intervention of M.'s answer between the question to him(S.) and his answer. The stipulatory act is therefore wholly null and void.

Suppose however the stipulation to have run:

form m.

T.: Maevi, decem dari spondes?

Sei, decem dari spondes?

form o

T.: Maevi, Stichum servum dari spondes?

S.: spondeo

M.: spondeo.

Here however the term 'eundem' is quite incapable of excluding cumulation. It serves indeed expressly to intervenes between the question to him and his answer; but M.'s promise is legally void on the same ground as before. The stipulation therefore is only partially void, a valid simplex obligation^{between T. and S.} being created.

We now perceive the possibility of construing the 'eadem' in form ~~xx~~^{j.} in a ~~xxxxxx~~ somewhat fresh light, namely, as the link connecting the two parts of one and the same^{joint} interrogatory. If this connection is once established the joint interrogatory itself will identify the two sums of X as one and the same sum, so that cumulation is excluded just as if a single question had been employed. Moreover the two questions may, we think be connected otherwise than by the use of 'eadem'. For example, if the stipulation were to run:

form n.

T.: Maevi, decem dari spondes ita ut tu et Seius duo rei promittendi fiatis?

form p.

T.: Sei, decem dari spondes ita ut ~~xx~~ tu et Maevius duo rei promittendi fiatis?

its validity would seem to be beyond doubt. By far the

¹⁾ vide infra p. 93.

most convenient way of establishing the connection was however by means of an inflexion of ~~idem~~ idem (is), which expressly identified the two generic prestation-objects as one and the same.

B. Obligations with specific prestation-objects.

Though evidence on the point is lacking, we can hardly doubt that the proper form of joint stipulation with separate questions was:

T.; Maeui, Stichum servum dari spondes?

Sei, eundem Stichum servum dari spondes?

Here however the term 'eundem' is quite incapable of excluding cumulation. It serves indeed expressly to identify the Stichus mentioned in the second question as the same slave as the Stichus mentioned in the first, but two or more obligations with the same specific prestation-object may quite well stand in a cumulative relation. Moreover any express identification of the two Stichus's in the stipulatory formula is really superfluous. Before there can be any possibility of a joint stipulation for Stichus, the 'individuality' of this slave must in the first place be ascertained. Here we see the difference between a specific prestation-object which has, and a generic prestation-object which has not, a concrete existence apart from the stipulation.

What then is the element in form γ , which excludes cumulation? Only one answer is possible, namely, the unity of the stipulation itself. Suppose a ~~single~~ single distributive question had been used:

T.: Maeui, Sei, uterque vestrum Stichum servum dari spondes?

(1) Any idea that M. and S. are liable cumulatively must be dismissed, and the fact of the interrogatory being split up into two separate questions cannot make any difference to the result. The ^{essential} ~~same~~ function of 'eundem' is therefore to connect the two questions as parts of one and the same interrogatory, and its omission will, as before, have the effect of rendering the stipulatory act legally void in whole or in part.

It is instructive to compare the results above attained with the case of novation.

A. If M. owes X to T. and the latter subsequently stipulates from S.: (eadem) decem quae Maevius debet, dari spondes?, the words 'quae M. debet' expressly identify the X promised by S. with the X. already due by M. Accordingly S.'s promise must novate the pre-existing obligation of M., for both cannot cumulatively owe the same sum of X.

B. If M. owes Stichus to T. and the latter subsequently stipulates from S.: (eundem) Stichum quem Maevius debet, dari spondes?', the words 'quem M. debet' certainly identify the Stichus promised by S. with the Stichus already due by M., but this identification does not of itself produce novation; it is perfectly possible for M. and S. to owe the same slave Stichus cumulatively. In order that novation may here take ^{la} place, and there can be no doubt that it did so, the law must give the stipulation from S. an import beyond that which it naturally bears, ~~namely~~ the import namely that S. here assumes the same liability to render Stichus as M. had previously been under.

vide infra p. 127

vide infra p. 128

(1) Inst. III. 16 pr.

- α. Et stipulandi et promittendi duo pluresve rei fieri possunt:
- β. stipulandi ita, si post omnium interrogationem promissor respondeat 'spondeo':
- γ. ut puta, cum duobus separatim stipulantibus ita promissor respondeat ~~inter~~ 'utrique vestrum dare spondeo':
- δ. nam si prius Titio spoponderit, deinde alio interrogante spondeat, alia atque alia erit obligatio nec creduntur duo rei stipulandi esse:
- ε. duo pluresve promittendi ita fiunt: 'Maevi, quinque aureos¹⁾ dare spondes? Sei, eosdem¹⁾ quinque aureos dare spondes?' respondeant singuli separatim 'spondeo'.²⁾

This important principium has a bearing on partition and novation as well as on cumulation, but we have postponed consideration thereof until now, in order to give a single exegesis of the whole. § 1 will be dealt with later.³⁾

We may safely infer ~~xxxxxxx~~ from § 2⁴⁾ that the whole of this title 'de duobus reis stipulandi et promittendi' is taken from the eighth book of Florentine's Institutes, but there is every reason to believe that the compilers have manipulated extensively the classical

- ¹⁾ presumably the classical original had 'sestercia' and 'eadem'. Florentine was seeking to exemplify the distributive form.
- ²⁾ v. l. et resp.; si resp. 'ut interroget stipulator' vel simile quid inter 'fiunt' et 'Maevi' a compilatoribus male deletum censet Mommsen. (Krüger, Inst.)
- ³⁾ vide ~~infra~~ p. 127 ff.
- ⁴⁾ vide infra p. 100 ff.

any break in
unity of act to have
between the
v. l. and the
v. l. 5.

in my opinion the stipulation by 5. could be void under the old
interpretation but under the classical principle it
would have the effect of constituting two stipulations
This matter will be discussed in my lecture on Accusation
esp. the corresponding passive case mentioned supra p. 100 f.

original. In particular the pr. seems to contain only an abbreviated version of ~~Flav~~ Florentine's exposition, designed to give Byzantine students a general idea of the correal stipulation which was now quite obsolete in practice.¹⁾

A careful examination of the pr. seems to disclose two distinct lines of argument which at the compilers' hands have become hopelessly intermingled. These deal respectively with (i) the joint form which excludes novation and cumulation, and (ii) ~~with~~ the distributive form which excludes partition.

(i) Periods β . and δ ., referring to the active case, are immediately connected. The debtor, it is laid down, must not reply until the joint interrogatory is complete. If he replies to the one creditor before the other has put the question, then we have two separate stipulations, not a single joint one, and the result cannot be ~~correal~~ correality.²⁾

(ii) By way of contrast to β . and δ ., periods γ . and ϵ . seem to have in view the exclusion of partition. In γ . we note the insistence on separate questions (duobus separatim stipulantibus), though the splitting up of the interrogatory can have had nothing to do with the exclusion of novation and cumulation; again in ϵ . the form of separate questions is realistically portrayed. As regards the response, period γ . ^{referring to the active case} gives us a single answer in distributive form, while period ϵ . ^{referring to the passive case} mentions two separate answers. In all this, it can hardly be doubted, Florentine was seeking to exemplify the distributive framework of the common form of correal stipulation,

¹⁾ vide infra p. 213

²⁾ Suppose the following stipulation were made:

see further infra p. M .: Titus decem dari spondes?
 T .: spondes
 S .: Titus, eadem decem dari spondes?
 T .: spondes,

in my opinion, the stipulation by S . would be void under the old strict civil law, but under the classical jurisprudence it would have the effect of constituting ~~him~~ S . (S.) an adstipulator on M 's behalf. This matter will be discussed in my treatise on Accusatoriality; cp. the correspondingly passive case mentioned infra p. 160 f.

no break in continuity of act to have been between the M . and the S .

namely, separate questions in the active and passive cases alike, separate answers in the passive case, a single answer (distributively conceived) in the active case. It does not follow that the classical jurisprudence insisted on a rigid ~~an~~ adherence to ~~this form~~ this form, provided always the interrogatory were distributive, but we may infer that any departure therefrom was regarded as unorthodox.

(3) If the foregoing observations be sound, we may surmise that Florentine dealt separately with the joint and distributive qualities of the correal stipulation, though any attempt to restore his argument would be futile.

(2) D. (45.3) 28.2. Gaius III de verb. obligat.

Si ipsi domini singuli eadem decem servo communi dari fuerint stipulati, et semel responsum secutum fuerit, duo rei stipulandi erunt, cum placeat dominum servo dari stipulari posse.

Here we have a correal stipulation:

M.: Titi, decem Stichos servo communi meo et Seii dari spondes?

S.: Titi, eadem decem Stichos servo communi meo et Maevii dari spondes?

T.: spondeo or Maevi, spondeo - Sei, spondeo, and like most other examples where a common slave is introduced, the case is highly instructive. We note the careful way in which Gaius sets forth the different elements necessary to the production of a correal relation. 'Singuli fuerint stipulati' denotes a distributive interrogatory consisting no doubt of separate questions. 'Eadem decem' denotes an identification of the two sums of X. 'Semel responsum secutum fuerit' denotes a single joint response given after both questions have been put;

it is apparently indifferent whether this response consist of one answer given to both questions or of two separate answers.¹⁾

Thus the present paragraph seems to bear out in all respects the conclusions which we have arrived at in our foregoing discussions. Ulpian however rejects this interpretation; the stipulation must have the same effect

(3)

D. (45.1) 38.19. Ulpian. XLIX ad Sabin.

Eum qui dicat: 'mihi decem et Titio ~~decem~~ decem' totally inconsistent with the idea of cumulation. We are certainly not entitled to apply this argument to the case est.

of a joint stipulation; for the latter is essentially a single Lenel's proposal to delete the first 'decem' as a gloss seems to destroy the whole point of this paragraph.

In order to discover Ulpian's true meaning, we must assume, as seems highly probable,³⁾ that he adopted the Proculian view as to the effect of a stipulation sibi et ~~ali~~ alii dari⁴⁾ and then look at the preceding ^{§ 18} ~~in~~ in stipulationibus ~~cum quaeritur quid actum sit~~, verba ⁵⁾ contra stipulatorem interpretanda sunt'. question at once

arises. Now consider a stipulation: mihi decem et Titio decem dari. If we can interpret this as equivalent to

¹⁾ 'semel responsum secutum fuerit' rather points to one answer (spondeo) given to both ~~questions~~ questions, but we must not interpret Gaius's words too narrowly; the form ~~X~~ 'Maevi, spondeo - Sei, spondeo' seems quite unexceptionable. A single answer in distributive form is not practicable here, because both obligations are for payment to one and the same party, namely, slave Stichus.

²⁾ Lenel (Pal. II, col. 1194) notat: decem gloss? ~~titio decem~~

³⁾ ~~inde supra p. 38. n. 1.~~

⁴⁾ Gai. III. 103. ~~vero similis est semper una decem~~

⁵⁾ This rule is eminently reasonable. It is the duty of the stipulator to see that his interrogatory is free from all ambiguity, and accordingly, whether we are interpreting the terms of a stipulation directly or through the medium of a written cautio which records their purport, any doubtful point must be decided against him.

two points in the case of a stipulation 'mihi et Titio decem dari' (i) that one and the same (una = eadem) sum of X is promised to both T. and myself, not the stipulation in T.'s favour is invalid. If the ~~stipulation~~, different sums, and (ii) that this sum is promised to stipulation in T.'s favour had been valid, the result would have been cumulation, the two sums of X ~~is~~ not being entitled to more than a pro rata share. Hence though identified in any way, and hence the deduction of T. still ~~leaves me entitled to X.~~ Ulpian however rejects this interpretation; the stipulation must have the same effect as if it had run: mihi decem et Titio eadem decem dari'.

Why? Simply because the unity of the stipulatory act is totally inconsistent with the idea of cumulation. We are certainly ~~not~~ entitled to apply this argument to the case of a joint stipulation; for the latter is essentially a single stipulatory act, though two or more persons on the one side or the other participate therein.

Here ends Ulpian's decision so ~~far~~ in the affirmative; the repetition of 'decem' (either far as recorded, and up to this point it is against the stipulator; the latter cannot maintain that separate sums of X were promised to himself and to T., in order to rebut the argument that he is only entitled to V. This decision however is manifestly incomplete, for the question at once arises whether the form 'mihi decem et Titio decem dari', though it relates merely to a single sum of X, can be given a distributive interpretation, by virtue of which I can claim the sum of X in full, ~~T. being detracted?~~

In this connection we may compare Julian. D. (45.1) 56 pr.:

~~Eum qui ita stipulatur:~~ 'mihi et Titio decem dare spondes?' vero similis est semper una decem communiter sibi et Titio stipulari, sicuti qui legat Titio et Sempronio non aliud intellegitur quam ~~una~~ decem communiter duobus legare.

This dictum of Julian's is carefully expressed and decides ~~the question~~

two points in the case of a stipulation 'mihi et Titio decem dari': (i) that one and the same (una = eadem) sum of X only is promised to both T. and myself, not different sums, and (ii) that this sum is promised to us 'communiter', which can only mean that neither is entitled to more than a pro rata share. Hence, though T. is detracted, I can still only claim a pro rata share; in other words, Julian, Sabinian though he be, here adopts the Proculian view.

The question now is, in the case of a stipulation, not 'mihi et Titio decem dari', but 'mihi decem et Titio (eadem) decem dari', the single sum of X should be regarded as promised to us, not ~~simply (communiter)~~ simply jointly (communiter) as in the former case, but distributively jointly (singulis in solidum)? In my opinion the probabilities are that this question should be answered in the affirmative; the repetition of 'decem' (with¹⁾ or without 'eadem') seems to have the effect of excluding just like the use of separate questions in a joint stipulation. Hence the Proculian view in favour of partition only applied to the case of a stipulation 'sibi et alii decem dari', not to the case of a stipulation 'sibi decem et alii decem dari'.

partition,

If the foregoing exegesis be sound we must assume that the compilers deleted the sequel to Ulpian's decision in fr. 38 § 19.¹ Perhaps in this context Ulpian ~~gave~~ entered into a detailed discussion of certain aspects of the stipulation sibi et alii dari, which seemed of no practical importance from the standpoint of the Justinianian law.

¹⁾ ^{cf.} ~~supra~~ ^{supra} p. 39 n. 1; 62 n. 4. In the present work we fix our attention exclusively on the first relation, which, if need be, we shall particularly describe as 'principal correality'.

Having now dealt with the negative functions of the correal stipulation, namely, the exclusion of partition, novation and cumulation, we turn to its positive function, namely the production of two or more co-ordinate principal obligations which are, by construction of law, one and the same.

The idea of unity of obligation lies at the basis of accessoriness as well as of correality, but there is an important distinction between the two cases. In accessoriness the unity is reached through a one-sided identification; the accessory obligation is identified with the principal obligation but not vice versa. In correality on the other hand we have two obligations standing side by side on a co-ordinate footing, so that a merely one-sided identification is out of the question. The only example which the classical law affords of a merely one-sided identification as between co-ordinate obligations is in the case of novation, where a later obligation is identified with, and so supersedes, an earlier one.

In the case of correality, then, unity of obligation can only be reached (i) directly through a reciprocal identification of two principal obligations, or (ii) indirectly through each of two obligations being accessorially related to the same principal obligation and hence being in a sense correally related to one another. The second of these relations which we call 'accessory correality' and which ~~only represents~~ represents a unity of obligation only to an imperfect extent, will be dealt with in our treatise on Accessoriness. In the present work we fix our attention exclusively on the first relation, which, if need be, we shall particularly describe as 'principal correality'.

Numerous passages can be quoted where the classical jurists refer to obligations correally or accessorially related as one and the same. For example:

Julian. D.(46.3)34.1 : 'obligatio communis';

Pomponius D.(45.2)19 : 'exemptus est obligatione';

Ulpian. D.(46.4)16 pr. : 'ex duobus pluribusque eiusdem

obligationis participibus';

Paul. note to Papinian. : 'duo rei Maevius et Titius

eiusdem obligationis';

Paul. D.(46.8)14 : 'eiusdem obligationis socius'. ¹⁾

That this unity of obligation was an objective unity is brought out by such passages as the following:

African. D.(46.1)21.4 : 'eiusdem pecuniae rei';

Pomponius D.(45.2)18 : 'ex duobus reis eiusdem Stichii

promittendi factis';

Papinian. ~~x~~ D.(26.7)38 pr. : '~~stichii~~ eiusdem pecuniae debitores';

Paul. D.(2.14)21.5 : 'qui eiusdem pecuniae exactionem

habent in solidum', 'eiusdem pecuniae

Paul. D. ² ~~2~~ 9 pr. : 'una debitorum' debitores';

Paul. D.(26.7)45 : 'duo rei ~~stichii~~ eiusdem debiti';

Paul. D.(46.1)71 pr : 'duo rei eiusdem debiti', 'alterum reum eiusdem pecuniae'.

On the other hand, in certain passages we find a plurality of obligations mentioned, for example, in ~~Ulpian~~

¹⁾ Cp. also Paul. D.(9.4)19 (relating to noxal actions) 'una obligatio'. In Ulpian. D.(45.2)3.1, the clause 'cum una sit obligatio, una et summa est' has been manipulated by the compilers; vide infra p. 130 ff.

'decem dari a Seio'. In short, the whole theory of

objective unity with subjective plurality is impossible;

we cannot operate with the objective element in an oblig-

atory relation apart from the subjective element; a

subjective difference implies an objective difference

likewise.

The reply to this argument simply is that we

¹⁾ vide infra p. 136 ff.

Ulpian.-Julian. D.(46.1)5 and Veneleius D.(45.2)13; ¹⁾
 also African. D.(46.1)21.1 : ~~ut fidelussor~~ ^{ut fidelussor} duabus oblig-
 ationibus eiusdem pecuniae
 nomine teneatur'.

There is nothing inconsistent in these different modes of expression'. If we wish to emphasise the 'objective unity', we say that there is one obligation, one debt, one prestation and so forth; if we wish to emphasise the 'subjective plurality', we say that there are as many obligations etc. as there are parties on the one side or the other. All this is perfectly natural and does not imply any idea of a correal obligation as a mystic 'two or more in one'. The terminology of the Roman jurists agrees essentially with our own; sometimes we find it convenient to speak of a 'single correal obligation', at other times of ~~x~~ 'two or more obligations correally related'.

To the whole idea of unity of obligation as here conceived there is frequently opposed an objection which may be stated thus: An obligation is essentially a relation between a particular creditor and a particular debtor; the object of such a relation, that is to say, the rendering of a ~~prestationem~~ certain prestation, e.g. decem dari, has no 'individuality' of its own apart from the particular subjects of the relation; a *decem dari Maevio* cannot in any sense be identical with a *decem dari Seio*, nor a *decem dari a Maevio* with a ~~Vdaxamx~~ *decem dari a Seio*. In short, the whole theory of objective unity with subjective plurality is impossible; we cannot operate with the objective element in an obligatory relation apart from the subjective element; a subjective difference implies an objective difference likewise.'

The reply to this argument simply is that we

vide infra p. 136 ¶¶. X to Gains; T. treats these max

are dealing with jurisprudence, not metaphysics; the objective identity which we speak of is something purely juristic, being constructed to serve definite legal ends, - to provide a theoretical basis for certain practical results. Moreover there is nothing repugnant to common sense in the conception of a single ~~obligation~~ objective obligation with a plurality of subjective relations, - any intelligent layman to whom this conception is explained will at once appreciate its reasonableness, - and this being so the lucubrations of our would-be legal philosopher may be summarily dismissed.

The idea of objective unity of obligation must now be analysed with the greatest care. Two obligations are objectively one and the same when they contain one and the same prestation. This identity of prestation implies an identity both of prestation-object and of

prestation-content; both obligations must 'dispose' of one and the same thing, and both 'dispositions' must be one and the same.

In the first place we must distinguish objective unity of obligation from mere unity of juristic end. The fact that two obligations decem dari are directed to the same juristic end (are based on the same material cause, are designed to satisfy the same economic interest) does not of itself render them objectively one and the same, - does not make the ^{two} ~~two~~ prestations of ~~the~~ X one and the same prestation of this amount. In order that objective ~~unity~~ unity may result the two prestations must be identified, in the case of formal negotia, by some formal process, in the case of formless negotia, by the intentions of parties.

Unity of juristic end without objective unity of obligation can best be illustrated by the contract of mandate. M. and S., each independently of the other, give T. mandates to lend X to Gaius; T. treats these ~~mand~~

of the prestation-content, and if this be so, an obligation mandates as referring to one and the same loan of X which he duly makes to G.; G fails to repay^{pa} this loan. Both M. and S. are liable to pay X to T., but the latter will certainly be prevented, - whether by law or by equity does not here concern us - from exacting more than a single payment of this amount; ~~hence~~ the two obligations are directed to one and the same juristic end. Yet these obligations are not objectively one and the same, - M. and S. do not owe one and the same prestation of X but different^{his failure to pay to G. is due to dolus} prestations, - because, the two mandates having been given independently of one another, there was no common intention on the part of M. and S. such as would effect the identification of two equal prestations precisely significant. The unity of juristic end without objective unity of obligation which appears in simple solidarity will be discussed later.^{identical stipulation - object requires no remark where the latter is a determinate species. For does the}

In the second place we must observe that two prestations cannot be identified/unless they are objectively equal in every respect. A generic prestation-object has no 'individuality' of its own, but is endowed

As regards prestation-object the question of equality presents no difficulty. Two generic prestation-objects are equal when they consist of equal sums of money, or of equal quantities of the same fungible genus (other than money), of indeterminate species of the same non-fungible genus. Two specific prestation-objects cannot be equal without being identical.²⁾

The case of the prestation-content is more complicated. In order that two prestation-contents may be equal the following conditions must be fulfilled:

- (i) The two acts must be homogeneous.
- (ii) The modalities, if any, to which ~~the~~ each act is subject must coincide. This rule does not apply to modalities of condition and term, which were deemed to belong to the obligation-content, not to the prestation-content.³⁾ But, though on the point is lacking, it would

appear that modalities of place were treated as part of

of the prestation-content, and if this be so, an obligation decem Romae dari and one decem Capuae dari must be pronounced unequal.

(iii) In each case the debtor must incur the same degree of responsibility for failure to perform the act. As regards obligations dari this point practically arises only where the prestation-object is specific. Thus suppose we have two obligations Stichum dari, and in one of them the debtor is liable if he fails to give Stichus through culpa, while in the other he is only liable if his failure be due to dolus, clearly these obligations are unequal in prestation-content.

In the third place we have to note what the mutual identifications of two equal prestations precisely signifies.

Identity of prestation-object requires no remark where the latter is a determinate species. Nor does the identification of two equal generic prestation-objects present any serious difficulty. A generic prestation-object has no 'individuality' of its own, but is endowed with a concrete existence simply for the purposes of the particular obligation. Hence there is nothing to prevent us endowing a single sum of money, a single quantity of a fungible genus (other than money), a single indeterminate species of a non-fungible genus, with a concrete existence as the common prestation-object of two obligations.

The identification of two equal prestation-contents, on the other hand, is a more abstract process.

(i) We must identify the two equal acts as one and the same act. For example, if M. and S. each promise X to T., identification of the ~~xxxx~~ two prestation-contents implies that the 'a Maevio dari' and ~~the 'a Seio dari'~~ the 'a Seio dari' ~~xxxx~~ are deemed one and the same act, irrespective of the subjective difference. This being

done, the identification of the equal modalities, if any affecting the two acts, ~~if~~ follows as a matter of course. (ii) We must identify the two equal responsibilities for failure to perform the aforesaid one and the same act. What does this mean? As regards the passive case the only possible meaning seems to be that the ~~responsibility~~ responsibility of each debtor is rendered 'extensive'; in other words mutual extensive responsibility seems to be a necessary element in mutual identification. For example, if M. and S. are bound each to render Stichus to T., and each is liable if he fails to fulfil ~~this~~ this duty through ^{culpa} identification of the two prestation-contents seems to imply that each is liable on the ground of the other's culpa as well as of his own. As this question of extensive responsibility as between correal debtors is a much debated one, we shall devote the next section specially to its discussion.

As regards the active case, e.g. where T. is bound to ~~give~~ render Stichus to M. and S., and is liable to each for culpa, identification of the two prestation-contents implies that any culpa incurred towards the one of the creditors has the same effect as if it had been incurred towards the other likewise. This point is however of no practical importance.

In the fourth place we have to note that the essential factor in objective identification ~~differs~~ (a) differs according as the prestation-object is/generic (b) or/specific. The joint nature of the correal stipulation

(a) Where two obligations have equal generic prestation-objects, say X, and we identify these as one and the same, then, if in addition the two prestation-contents are equal, identification of the latter and therefore ~~of~~ under the civil law. Unity of cause is essentially

full identity of prestation will naturally follow, unless there be some element in the situation which excludes identification, for example, if two parties stipulate correally dotis nomine.¹⁾

(b) Specific pretation-objects cannot be equal without being identical. Hence before there can be any question of identity between two obligations with specific prestation-objects, the latter must first be admitted to be one and the same. This identity of prestation-object does not however imply identity of prestation, even though the two prestation-contents be equal, for two obligations may have one and the same ^{specific} prestation-object and yet be related cumulatively. In order then to achieve identity of prestation, our efforts must be directed to identification of the two prestation-contents.

The essential factor in case (a) is therefore identification of the two prestation-objects, in case (b) ~~identi~~ identification of the two prestation-contents.

principal

Having thus endeavoured to bring out all that is implied in the mutual objective identification of two obligations, we now enquire regarding the stipulatory means for producing this identification. There can be no doubt as to the decision of the civil law on this point. Two co-ordinate principal obligations ex stipulatu ~~ex~~ can only co-exist as one and the same when they arise from one and the same joint stipulation, the latter being distributively framed in order to avoid partition. The joint nature of the correal stipulation identifies the two resulting obligations reciprocally, gives them the quality of co-ordinate branches of a single correal obligation, and in no other way can ~~two~~ ^{principal} ~~principal~~ obligations ex stipulatu become so related under the civil law. Unity of cause is essentially

1) vide supra p. 110, 168 ff.

inconsistent with novation, ~~XXXXXXXXXXXXXXXXXXXX~~
 because in the case of the latter we have merely an
 one-sided identification which causes an existing
 obligation ~~to~~^{be} superseded by a fresh one. Likewise
 unity of cause is, strictly speaking,¹⁾ inconsistent with
 accessorality, because in this case we have merely a
 one sided identification which places the one obligation
 in a subsidiary relation to the other. But unity of
 cause is essentially consistent with correality, for it
 presents the sole means of constituting two co-ordinate
 obligations which from the first moment of their existence
 are mutually identified the one with the other.¹⁾ which

1) The classical jurisprudence, however, seems to have educated
 a joint stipulation in which a principal debtor and fiduciary were
 taken bound; this will be explained in my treatise on Accessoriality;
~~specifically.~~

the proper time; in other words, more, "In the first
 case the obligation is perpetuated in the sense that the
 debtor remains liable to pay the creditor's pecuniary
 interests, though specific performance is now wholly or
 partially impossible; in the second case the obligation
 is perpetuated in the sense that the debtor remains
 similarly liable though the prestation-objects should,
 subsequent to the default, be lost or deteriorated through
 a cause for which he would not otherwise be responsible.

¹⁾ See on the whole matter Levy, *loc. cit.* p. 210 n. 5.

2) See in *Lehrbuch* n. 2 on following page

Paul says, D.(45.1)91.3: sequitur videre de eo quod ~~XXXXXX~~ veteres constituerunt, quotiens culpa intervenit debitoris perpetuari obligationem, quemadmodum intellegendum sit, et quidem si effecerit promissor quo minus solvere possit, expeditum intellectum habet constitutio: si vero moratus sit tantum, haesitatur an, si postea in mora non fuerit, ~~xxx~~ extinguatur superior mora.

Here at first sight we appear to have recorded an ancient maxim, 'quotiens culpa intervenit debitoris, perpetuatur obligatio', or, as it is commonly abbreviated by modern writers, 'culpa perpetuatur obligatio', which covers two cases: (i) that of wrongful act or neglect on the debtor's part causing loss or deterioration of the prestation-object, so that specific performance becomes wholly or partially impossible; this^m conveniently described as 'culpa' in a special technical sense which of course includes actual dolus; and (ii) a wrongful failure on the debtor's part to fulfil the obligation at the proper time; in other words, mora.²⁾ In the first case the obligation is perpetuated in the sense that the debtor remains liable to pay the creditor's pecuniary interesse, though specific performance is now wholly or partially impossible; in the second case the obligation is perpetuated in the sense that the debtor remains similarly liable though the prestation-object should, subsequent to the default, be lost or deteriorate through a cause for which he would not otherwise be responsible.

¹⁾ See on the whole matter ~~x~~ Levy, Konk., p.210 n.5.

²⁾ See ~~our~~ *Take in note 2 on following page*

We cannot here discuss the conditions necessary to establish mora. Siber (ZSS, 29, p.47ff) has disposed of the view that a formal 'interpellatio' was regularly required under the classical law.

³⁾ ZSS, 34, p.255 ff.

Gradenwitz has however proved that the formulation of the rule in the passage quoted must have been due to Paul himself, and cannot have been a verbatim reproduction of the ancient maxim. Pomponius, D.(12.1)5, gives us an idea how the ancient maxim actually ran: quod te mihi dare oporteat si id postea perierit quam per te factum erit quo minus id mihi dares, tuum fore ~~ut~~ id detrimentum ~~constat~~ constat. The traditional mode of describing a party as in mora appears then to have been: 'per eum factum est ^{statit} (statit) quo minus det' ^{(daret) 'a the like} or the like; and further the case of 'culpa', where the debtor 'effecit quo minus dare ^{(posset) 'a the like,} possit, appears to have been regarded simply as an aggravated form of 'per eum factum est quo minus det', and to have been governed by precisely the same principles. Paul's formulation of the rule in D.(45.1)91.3 is perfectly intelligible. What he has done is to ^{ei} seize upon the element of 'fault' inherent in both cases and made this element the basis of a general doctrine of perpetuatio obligationis.

Now for our present purposes the significance of the results established by Gradenwitz lies in this, namely, that in applying the doctrines of 'culpa' and mora to the correal obligation, we must abandon any idea of discriminating between their respective consequences. Suppose T. stipulates for Stichus from M. and S. correally, and subsequently sues M. on the contract; M. pleads in defence that the slave is dead and the obligation is therefore extinguished; T. in replying admits the death, but alleges either (i) that it occurred through 'culpa' on the part of S. (Seius effecit quo minus Stichus dari possit) or (ii) that it occurred after S. was in mora

2) We cannot here discuss the conditions necessary to establish mora. Siber (ZSS. 29, p. 47ff) has disposed of the view that a formal 'interpellatio' was regularly required under the classical law.

1) ZSS., 34., p. 255 ff.

take in as note 2)
* preceding page.

postquam (per Seium factum est quo minus Stichus ^{*laetetur*} ~~detur~~). Both these allegations have equal value or none at all; if T. is entitled to plead 'culpa' on the part of S. as a ground of action against M., he is likewise entitled to plead mora, and vice versa. The question we have to decide is, are these pleas relevant or ^{not} irrelevant? does 'culpa' ^{and} ~~or~~ mora on the part of one correal debtor infer liability to the other or does ^{they} ~~it~~ not? *can never*

The attempt in the foregoing section to work out the exact meaning of the objective identification of two co-ordinate obligations led us to the result that mutual extensive responsibility was an essential element in such identification; hence a priori we must answer the last question in the affirmative. Another consideration seems to favour the same result. Suppose M. and S. have ~~erroneously~~ correally promised Stichus to T., and S. through culpa kills the slave before delivery; T. however sues M., erroneously thinking that the slave was killed by the latter; in iure M. does not deny fault but simply joins issue. Under the classical law of process-consumption S. is freed and T. loses all recourse against him, though the evidence at the trial, contrary to T.'s expectations proves that he (S.) was the party really at fault. Hence if M. cannot be condemned on the ground of S.'s ~~fault~~ fault, T. suffers a great hardship. Under these circumstances any impartial observer would, I venture to think, say that T., as a set-off to the ^{is} disadvantage imposed on him by the ^{extensive} process-consumption rule, ought to have the advantage of being able to hold either debtor liable for the other's fault.

Now let us glance at the standpoint of the Justinianian law;

(i) 'Culpa'. Process-consumption being now abolished, T. would in the case last figured be able to bring a

subsequent action against S. the party actually at fault. Hence the equitable argument in favour of extensive responsibility no longer ~~exists~~, and without any hardship each may be held liable for his own 'culpa' only.

Culpa communis alone necessarily infers liability to both. (ii) Mora. Under the Justinianian law, mora means failure on the debtor's part to comply with a formal interpellatio; without such interpellatio ~~it~~ it can never arise. If then the creditor has addressed his interpellatio to one of two correal debtors only, the natural inference is that ~~this~~ debtor only can be held ~~for~~ responsible for failure to comply with the demand. If the creditor wishes to hold both responsible, he should interpellate ~~factum~~ both.

A priori then we are quite prepared to find the doctrine of extensive responsibility rejected by the Justinianian law. ~~Now~~ What have the authorities to say on the matter?

In the first place, Levy¹⁾ has addressed a powerful argument in favour of extensive responsibility under the classical law in the case of ~~the~~ co-tutors. He has proved that co-tutors jointly administering an undivided estate were correal debtors in the full sense and that the one was responsible for all loss caused through maladministration on the part of the other. But on the other hand he has also proved that the compilers have consistently interpolated the classical texts with a view to eliminating this extensive ~~the~~ responsibility and making each tutor liable for his own acts ~~and~~ and omissions alone.

In the second place let us consider

¹⁾ ZSS. 37, p. 14ff.; Konk., p. 220 ff.

D. (45.2)18 Pomponius V ex Plaut.

Ex duobus reis eiusdem Stichī promittendi factis
alterius factum alteri quoque nocet.

though the value of
isolated fragment
the present is small,
if we

Any attempt to deny the substantial genuineness
of this fragment or to understand 'factum' as used by (St.)
in the natural sense
Pomponius, in any other sense than that of ~~xxxxxx~~ an act
causing death or injury to Stichus, seems hopeless. Thus
we have ^{here} a direct authority in favour of the view that
correal debtors were extensively responsible. The only
difficulty is why, assuming that under the Justinianian
law a correal debtor was only responsible for his own
'culpa', the compilers should have left this passage
standing. The explanation may be that they meant the word
'factum' to signify an act which interrupted the running
of prescription; as ^{is well known,} Justinian by C. (8.39(40))4(5)
of the year 531, provided that any act which interrupted
prescription in favour of one correal creditor or against
one correal debtor enured to the benefit or to the pre-
judice of both. ²⁾

In the third place we have to consider the two
passages which, as they stand, affirm that each correal
debtor was responsible for his own mora alone:

✕ D. (22.1)32.4 Marcian. IV regul.

Sed si duo rei promittendi sint, alterius mora alteri

[non] nocet.

I suppose

~~the worst we can say against it is that the close sequence~~

of 'factis' ~~xxxxxx~~ and 'factum' is not very elegant;
quite likely the compilers have deleted something after
'factis'.

²⁾ cp. Binder p. 273 f. who even imagines that the compilers
have interpolated Pomponius's words so as to make them
apply to this case; this writer, it may be remarked, opposes
the theory of the exclusive liability of correal debtors.

D.(50.17)173.2. Paul. VI ad Plaut.

Unicuique sua mora nocet. quod et in duobus reis
promittendi observatur.

Certainly neither of these passages inspires much faith in its own genuineness.

As regards the first we note that the fragment D.(22.1)32 has been ^{much} interpolated and that its concluding paragraphs lack concinnity. There seems every likelihood that the compilers among other manipulations, inserted the 'non' in our present § 4.

As regards the second passage, obviously little reliance can be placed on an isolated statement of this kind torn by the compilers from its context. Doubtless there is a close connection between this passage and D.(45.1)88, which begins 'mora rei fideiussori quoque nocet'. But why does the mora of a principal debtor enure to the prejudice of a fideiussor? Simply because a fideiussor identifies his obligation with that of the principal debtor. We have already seen, however, that correality implies a mutual identification of the two obligations. It is therefore logically impossible for a fideiussor to be held responsible for mora of his principal debtor, and yet for one principal correal debtor not to be held responsible for mora of the other.

Hence, whatever Paul did write in the passage now figuring as D.(50.17)173.2, - and speculation on this point seems in the present state of our knowledge futile, - it is almost a certainty that he did not deny the extensive responsibility of correal debtors for mora, but rather

affirmed the same.

We therefore feel justified in holding that in the case of a passive correal obligation ~~for the rendering of a~~ ~~the determinate species~~, the classical law ~~has treated~~ each co-debtor as liable for the 'culpa' and mora of the other; that is to say, extensive responsibility was an essential element in the passive principal¹⁾ correal relation.

Conversely it would appear that on principle all 'culpa' or mora which serves to perpetuate the obligation in favour of one of two correal creditors must do so in favour of the others also; but this case is of no practical ~~importance~~ importance.

In this section ~~the~~ the constitutive elements requisites of the correal stipulation will be dealt with. According to the strict civil law the constitutive requisites of the stipulation in general were entirely formal, but the mature classical jurisprudence added a material requisite, to wit, the fact of consensus. We shall consider separately I. the formal requisites of the correal stipulation, and II. its material requisite. For the purposes of

9) In our treatise on Accessoriality we shall see that the principle of extensive responsibility does not apply in the case of accessory correalty.

account. The necessity of a connection between the two questions is assumed and will not further be referred to.

I. Formal constitutive requisites.

The formal constitutive requisites of the correal stipulation fall under two heads:

(A.) those which are mainly applications of the formal constitutive requisites of the stipulation in general,

The 'requisites' of a juridical act are the ~~elements~~ elements necessary to its full validity as such. They may be divided into two classes (i) 'constitutive' requisites, namely, the elements which give ^{a juridical} the act its existence ^{as such, and} in the absence of any one of which we have no ^{juridical} act at all, and (ii) 'effective' requisites, namely, the elements which enable a constituted ^{juridical} act to accomplish its end, and in the absence of any one of which ~~the~~ the act, though ex hypothesi ~~existent~~ existent, is either altogether futile or endowed with an efficacy less than normal.

In this section ~~we shall deal with~~ the constitutive ~~elements~~ requisites of the correal stipulation. ^{will be dealt with.} According to the strict civil law the constitutive requisites of the stipulation in general were entirely formal, but the mature classical jurisprudence added a material requisite, to wit, the fact of consensus. We shall consider separately I. the formal requisites of the correal stipulation, and II. its material requisite. For the purposes of the following exposition only the common form of correal stipulation with separate questions and, in the passive case, separate answers need be taken into account. The necessity of a connection between the two questions is assumed and will not further be referred to.

I. Formal constitutive requisites.

The formal constitutive requisites of the correal stipulation fall under two heads:

(A.) those which are ^{in the main} applications of the formal constitutive requisites of the stipulation in general, and

(B.) those which depend more particularly on the nature of the correal stipulation as a single joint act.

(A.). The formal requisites of this class are as follows:

(1) Praesentia. All the parties on both sides must be present together at one time and place. A subtle point suggests itself as to whether the proceedings may be commenced before one of the co-creditors or co-debtors arrives. Thus suppose T. and M. are present together alone, and T. puts the question: *Maevi, ~~decem~~ decem dari spondes?* Then S. comes on the scene, and T., after explaining to him what has occurred, says: *Sei, eadem ~~decem~~ decem dari spondes?*, after which both M. and S. reply. Are M. and S. duly constituted correal debtors? In the absence of authority we may leave the learned reader to work out the results in this and similar cases according to his own appreciation of the position, it being always borne in mind that the mature classical jurisprudence may possibly have modified the strict civil law consequences.

(2) Oral Interchange. The creditor must put an oral question to each debtor and each debtor must give an affirmative oral answer, or each creditor must put an oral question to the debtor and the debtor must give an affirmative oral answer covering both questions. If in the passive case only one of the debtors replies, or if in the active case the debtor replies to one creditor alone, e.g. *Maevi, tibi (soli) dare spondeo*, of course we have no joint act, but the mature classical jurisprudence held that a valid simplex obligation was constituted

¹⁾ an analogous case is mentioned in connection with the rule of 'continuous presence' *infra* p. 93

²⁾ *see further* *infra* 97 f.

(3) Obligation. The interrogatory must be directed to the constitution of ~~an~~ obligatory relations between the creditor and each debtor or between each creditor and the debtor;¹⁾ it may contain conditions or terms rendering these relations meanwhile imperfect or immature; the classical law permitted the questions of the ~~interrogatory~~ interrogatory to differ modally as regards condition and term, ~~eg~~ e.g. T.'s question to M. may be 'pure', his question to S. may be subject to a condition and so forth.²⁾

(4) Spondere. The verb spondere can only be employed by Roman citizens. This rule calls for no remark.

(5) Correspondence. The response must 'correspond' to the interrogatory, or more precisely, if the response consist of two answers each of the latter must correspond to its own antecedent question, if it consists of a single answer the latter must correspond to both questions. The requisite of correspondence consists of ~~the~~ two ~~rules~~ rules which we call the rules of 'congruence' and 'acquiescence' respectively. is given, for

(i) The rule of Congruence means that the principal verbs in the question and ^{the} answer must ^{informally} agree. Thus a question 'spondes?' must be followed by an answer 'spondeo', a question 'dabis?' by an answer 'dabo' and so forth. Consider now ~~the following~~ this stipulation:

T.: Maeui, decem dari spondes?

Sei, eadem decem dabis?

M.: spondeo

S.: dabo.

Is the rule of congruence here complied with? Yes, because each answer is congruent with its own antecedent question, though as we shall see presently, the use of

1) -----
an obligation connotes the rendering of a prestation in the future: dari spondes? dabis? facies? etc.; the use of the present; das? facis? etc. would render the stipulation inept. In ~~acceptilatio~~ acceptilation the position ^{is} exactly the reverse; the obligation must be discharged ~~forthwith at the~~ instantaneously.

2) ^{see further} *Op. infra* p. 97

different principal verbs in a joint interrogatory is not permissible and on this ground the proceedings are void.

(ii) The rule of Acquiescence means that the answer must express an exact agreement with the terms of ~~the~~ the question without any addition, detraction or variation whatever. Consider now this stipulation:

T.: Maevi, decem dari spondes?

Sei, ex ~~maevi~~ eisdem decem quinque dari spondes?

M.: spondeo

S.: spondeo.

So far as the rule of acquiescence is concerned, this stipulation is quite unexceptionable, for each answer expresses an exact agreement ~~in~~ with the terms of its own antecedent question,¹⁾ though, as we shall see presently, the ^{objective} inequality between the two questions renders the whole proceedings void. The only complication arises where the two questions differ modally as regards condition or term, and a single answer is given, for example:

M.: Titi, decem dari spondes?

S.: Titi, eadem decem, si navis venerit, dari ~~spondes~~ spondes?

T.: utrique vestrum dare spondeo.

Can T.'s single answer serve as an acquiescence in both questions respectively in spite of their modal ~~differences~~ difference? Probably yes; so far as it applies to ~~M.'s~~ M.'s question it is ^{to be} understood as pure, so far as it applies to S.'s question it is ^{to be} understood as conditional.

In such a case, however, it might be better for T. to

¹⁾ cp. ~~Inst.~~ Inst. III. 19. 5 i. f. (nam si hoc solum).

give separate answers: Maeui, spondeo - Sei, spondeo.

(6) Continuus actus. All the questions and answers must comprise one continuous act. Originally, it would appear, the law was that the response must ~~follow~~ follow the interrogatory, and the different questions of the interrogatory and the different answers of the response must follow one another, forthwith. Under the mature classical jurisprudence, on the other hand, ~~we believe this requisite was satisfied~~ the satisfaction of this requisite depended, ^{we believe,} ~~solely~~ solely on two rules, which we call those of (i) 'continuous presence' and (ii) 'abstention' respectively, ~~using full~~ ~~fixed~~. Provided these rules were observed the elapse of an interval of any length between different stages

observance of

of a stipulatory act did not matter.

(i) The rule of Continuous Presence means that throughout the proceedings all the parties must remain constantly in one another's presence. If one of them 'goes away' (discedere) in the middle of the proceedings, a break is caused in the continuity of act. In the case of a simplex stipulation the effect of such a break offers no difficulty; the whole proceedings are rendered void. Thus if T. stipulates from M., and the parties then separate, no matter for how short a period, the continuity of act is broken absolutely, and no answer given thereafter has any effect; if it is desired to make a valid stipulation T. must repeat the question. The only problem is when must a party be deemed to have 'gone away'; in my opinion this point ~~can only~~ ^{must} have been regarded as one of fact, ^{to be decided by the judge with reference to the circumstances of the concrete case.}

The application of this rule of continuous presence to the correal stipulation may give rise to a variety of problems. For example, suppose T. inter-

-rogates M. and S. correally, and before any response is given M. goes away; even if M. returns at once, no response given by him can have any effect, because so far as he is concerned, the continuity of act is broken. But does M.'s departure break the continuity of act so far as S. is concerned? The answer ^{of the mature classical jurists} must, it is thought, be in the negative; ~~the~~ M.'s departure simply eliminates him from the proceedings, and it is still open to S. to ~~give~~ give an answer which will constitute a valid simplex obligation between T. and himself. This case is comparatively ~~simple~~ plain, but consider the following: T. interrogates M. and S. correally; M. replies and then goes away ^{before S. has done so.} Here a valid obligation is created between T. and M., but what effect has M.'s departure on S.'s position? Can S. still make a valid reply? if he can, does this reply, even though given in M.'s absence, render him a correal debtor with the latter? There is just a possibility that Venuleius may have dealt with some such point in the passage now figuring as D. (45.2)12 pr.¹⁾

(ii) The rule of abstention means that throughout the proceedings all the parties must abstain ~~from~~ from any other business. If one of the parties does turn to other business (ad aliud negotium accedere²⁾, the effect is the same as if he had gone away.

(B.) We now turn to the second class of requisites, which depend more particularly on the nature of the correal stipulation as a single joint act. The two questions are but parts of a single interrogatory, and as parts they must be consistent with the whole and

1) *infra* p. 104 §§ 107.

2) *cf. supra* p. 128 n.1.

with one another.

(7) Though authority on the ~~point~~ point is lacking, we may lay it down as practically certain that each question must contain the same principal verb; in other words the questions must be congruent inter se. Such a stipulation as

T.: Maevi, decem dari spondes?

Sei, eadem decem dabis?

M.: spondeo

S.: dabo,

would, in our opinion, be absolutely null and void; the difference in principal verb destroys the self-consistency of the interrogatory.

(8) There must be equality of prestation-object between the two questions. Here we must distinguish the cases of (a) generic and (b) specific prestation-object.

(a) Such a stipulation as
~~Txxxxxxsxxxxxarixxxxspondes?~~

T.: Maevi, decem dari spondes?

Sei, ex eisdem decem quinque dari spondes? etc would be wholly void; the same interrogatory cannot at the same time relate to a sum of X and also to a sum of V, even where the V mentioned in the second question are expressly stated to be part of the X mentioned in the first. Any suggestion that M. and S. are here rendered correally liable quoad V, while M. is liable as sole debtor quoad another V, must be dismissed absolutely. The classical law does not admit anything like 'pro tanto ~~xxx~~ correality'.²⁾

(b) In the case of stipulations ^{for} ~~for~~ determinate species, we cannot have equality of prestation-object without identity thereof. Accordingly our present ~~requirements~~

¹⁾ cp. Levy, Sponsio, p.126 n.1.

²⁾ cp. supra p. 18; infra p.155

requisite here means that each question must refer to one and the same determinate species. Obviously an interrogatory one question of which referred to a slave Stichus, the other/~~to another slave~~ Pamphilus, would lack inward consistency, and hence be void. The only point is whether a stipulation:

T.: Maevi, Stichum servum dari spondes?

Sei, eundem Pamphilum servum dari spondes?

would be valid if the slave described as Stichus in the one question and as Pamphilus in the other ^{actually} be in point of fact one and the same. In my opinion even this material identity would not ~~cure~~ cure the formal defect in the interrogatory. 1)

(9) There must be equality of prestation-content between the two questions. Though authority on the point is lacking, I believe we must hold that the mention of different places of payment or delivery in the questions respectively, will render the proceedings

void; for example

Ex T.: Maevi, decem Romae dari spondes?

Sei, eadem decem Capuae dari spondes?

~~Where the prestation-object is a determinate species (or in the case of obligations fieri facere),~~ This same requisite excludes the possibility of the two questions prescribing different degrees of responsibility in case the obligation is not fulfilled. ~~For example, such a stipulation as~~

T.: Maevi, Stichum dari spondes?

Sei, eundem Stichum dari spondes ita ut tantum dolus malus a te praestetur?

where M. incurs ordinary legal liability for culpa, but S.'s liability is expressly restricted to dolus, would

1) as to the enormous case where two parties promise Stichus ~~certainly~~ ^{correctly} ~~stichus~~, but mean different slaves of that name, vide *infra* p 99

in our opinion be void.

(10) Equality of prestation-object and prestation-content being assumed, the formula must not ~~xxx~~ contain any element which prevents the identification of the two prestations as one and the same. For example, such a stipulation as

T.: Maevi, decem dari spondes?

Sei, alia decem dari spondes?

would be void. Identification of the two generic prestation-objects is here expressly excluded, the purport of the formula being to produce cumulation, but cumulation and joint stipulation are incompatible. Two questions relating to different sums, though of equal amount, cannot possibly be united as parts of the same interrogatory.

Again such a stipulation as

T.: Maevi, ~~a~~ Stichum dari spondes ita ut culpa tantum tu^a, non etiam Seii, a te praestetur?

Sei, eundem Stichum dari spondes ita ut culpa — tantum tua, non etiam Maevii, ^{ia} a te — praestetur?

would in our opinion be void. Each of the ~~xx~~ questions here figured, by virtue of the restriction of responsibility to culpa of the particular debtor, bears an individualistic quality which militates against the combination of both as parts of one and the same interrogatory, inasmuch as it deprives the latter of inward consistency. This agrees entirely with the principle that objective identification implies extensive responsibility.

This finished our ~~exposition~~ statement of the formal constitutive requisites of the correal stipulation. A few supplementary points must now be noted.

¶ In the first place the rule which permits the two questions of the interrogatory to differ modally as regards condition and term, calls for a brief consideration. We ask, how is such a modal difference compatible with the unity of the interrogatory? As a matter of fact, it seems quite possible that we have here a refinement of the classical jurisprudence which would not have commended itself to the conditores iuris antiqui. Apparently the matter was regarded in the following light: By the ^{introduction} ~~insertion~~ of a condition or term an obligatory relation is rendered imperfect or immature until the condition is fulfilled or the term arrives, but all this has no bearing on the actual prestation to be rendered or the manner of rendering it, - in other words, on the obligation-object. Hence two obligations may be objectively one and the same in spite of a modal difference of condition or term; such a difference is not in the obligation-object, but merely in the ~~the~~ obligation-content.¹⁾ Having arrived at this result, the jurists were bound to give effect to the same by admitting the possibility of a corresponding modal difference in the two questions of a joint ~~interrogatory~~ interrogatory, though the nature of the latter would appear prima facie to exclude this possibility.

¶ On the second place we must remark on the rule that if T. interrogates M. and S. correally and M. alone replies, or if M. and S. correally interrogate T. and T. replies to M. alone, a valid simplex obligation is thereby created. Here again we may doubt whether the result arrived at by the classical juris-

¹⁾ in the same sense, vide *supra*. p 13.

Prudence would have gained the approval of the ancients. The latter might quite well have argued that a joint interrogatory contemplated the creation of two obligations, and unless it ~~fulfilled~~ fully achieved this end it was altogether futile. And indeed Julian who states the rule in D.(45.2)6,¹⁾ gives a very guarded decision (*verius puto*) in the passive^{Case} (pr.). This hesitation was well justified, for if two parties agree to make a correal promise, the intention of each presumably is that he shall be bound ~~xxx~~ together with the other or not at all. Yet the debtor who replies first, say M., has no guarantee that the other S. will also reply, and thus he runs the chance of being left as sole debtor. The same considerations do not arise in the active case, and accordingly Julian does not here evince any hesitation (§2).

In the third place, if our conjectures regarding § 3 of the last quoted fragment be sound, the classical jurisprudence afforded the parties to a passive ~~joint~~ correal stipulation a simple means of excluding the possibility of one debtor being bound without the other. This means, we believe, consisted in the addition to each question of a clause fixing a period of time within which the answers must both be given, and providing that unless both debtors reply (that is, of course, validly in the affirmative) within this period neither shall be bound, thus:

T.: Maevi, decem dari spondes, ita ut ~~utroque~~ intra
duodecimam partem unius horae tu et Seius
respondeatis et nisi intra hoc tempus
utriusque responsum secutum erit, neuter
teneatur?

Sei, eadem decem....tu et Maevius....?

¹⁾ *infra* p. 191 ff.

44) *see* Riccio, *La forma della stipulatio*, p. 4 (extract from B.D.R. 31); Jacobson, D. (44.2) 35; Ulpian D. (2.14) 1, 3. As is well known, the requirement of mutual consensus raises difficult problems, which cannot be entered into here.

II. Material constitutive requisites.

According^d to the old civil law, stipulation was ~~xx~~ a formal act in the strictest sense, being devoid of any material constitutive requisite, or perhaps we should rather say, having material constitutive requisites reduced to a minimum.¹⁾ If two parties went through the appropriate ~~f~~ verbal form under circumstances which gave it the appearance of a genuine legal act,²⁾ a stipulation was constituted,³⁾ quite irrespective of the existence of a real consensus between the parties. The classical jurisprudence on the other hand pronounced the material fact of consensus to be an essential element in every negotium.⁴⁾

Applying this material requisite to the case of the correal stipulation, in the first place we observe that there must be a real consensus between the single party on the one side and each of the parties on the other. If for example T. stipulates from M. and S. correally, and there is a real consensus^{us} between him and M., but not between him and S., the result can only be that M. is bound as sole debtor, no juridical act having taken place so far as S. is concerned. In the second place we observe that there must be a real consensus between all the parties on the one side or the other. Suppose T. stipulates correally ~~from~~ for Sticlus from M. and S., and M. means one, S. another, slave of this name, correality is impossible, and probably the whole act would be pronounced non-existent. The 'individuality' of a specific prestation-object must be determined before a joint stipulation^{for the same} can be thought of.

1) see following note.

2) Obviously if two persons went through the form of stipulation on the stage, no juridical act would be concluded; hence we cannot eliminate all material conditions to the existence of a legal stipulation; at any rate the circumstances must be such as to give the ^{proceedings} act a juridical complexion.

4) see Riccobono, *La Forma della Stipulatio*, p. 4 (extract from BIDD. 31); Javolen. D. (44.7) 55; Ulpian D. (2.14) 1.3. As is well known, the requirement of material consensus raises difficult problems, which cannot be entered into here.

whether it will be
future is another
matter

(1) ~~FF~~ D. (45.2)7 Florentin. VIII inst.

Ex duobus reis promittendi alius¹⁾ in diem vel sub
condicione obligari potest: nec enim imperimento²⁾
erit dies aut condicio quo minus ab eo qui pure
obligatus est petatur.

This passage, which is reproduced with two trivial alterations in Inst. III.16.2, constitutes the authority for the rule that the two questions of a joint interrogatory may differ modally as regards condition or term. Florentine only mentions the case where the one question is pure, the other conditional or ~~terminal~~ termal. Clearly ~~however~~ however the same principle must apply where each question contains a different condition or a different term, ~~pr~~ or the one a condition and the other a term. Moreover there seems no good ground for refusing to extend the principle to the active case.

The motive given in the second part of the fragment (nec enim...) is not without significance; for, Florentine says, the term or condition to which the one obligation is subject does not prevent the pure obligation being enforced forthwith. Nothing is here said as to the anomaly of a modal difference in the two questions of one and the same interrogatory; by Florentine's time any difficulty on that score had apparently been overcome. The only point is whether two obligations correally related can be enforceable at different times; as these obligations are one and the same, does not the condition or term in the one affect the other likewise, so that in result the attempt to establish a modal difference between them fails? Florentine answers this question in the negative, and accordingly holds the modal difference effective.

¹⁾ ~~pure~~ pure, alius' ins. Inst. III.16.2.

²⁾ 'enim' del. Inst.

(2) (27) D. (45.2)6 Julian. LII digest.

pr. α. Duos reos promittendi facturus si utrumque interrogavero sed alter dumtaxat responderit, verius puto eum qui responderit obligari: neque enim sub condicione interrogatio in utriusque persona fit, ut ita demum obligetur si alter quoque responderit;

β. <+>¹⁾

γ. <+>²⁾

§ 1

δ. duobus autem ~~reus~~ reis<->³⁾ constitutis, quin liberum sit stipulatori vel ab utroque vel ab altero dumtaxat fideiussorem accipere, non dubito.

ε <+>⁴⁾

§ 2

ζ. sed si [a duobus reis stipulandi interrogatus] respondisset uni se spondere, ei soli ~~tenetur~~ tenetur.

¹⁾ (from γ.) sed duo rei sine dubio ita interrogari possunt ut et temporis ratio habeatur intra quod uterque respondeatur et nisi intra tempus statutum utriusque responsum secutum fuerit, neuter teneatur.

²⁾ (from ι.) In duobus reis promittendi constituendis si eadem stipulatione fideiussor quoque adhibeatur, non nisi pro utroque obligari potest, et post ~~duos~~ duos debet et interrogari et respondere: nam ~~si~~ inter interrogationes ad duos reos factas si interrogatus fuerit vel inter duorum reorum responsa si responderit videtur impedire obligationem eius qui postea interrogatur vel ~~respondet~~ respondet.

³⁾

iam

⁴⁾ (from ζ)

Si a duobus reis stipulandi interrogatus respondeat 'spondeo', utrique teneri constat:

§ 3 7. [duo rei sine dubio ita constitui possunt, ut et
temporis ratio habeatur intra quod uterque respondeat]

A. [modicum tamen intervallum temporis, item modicus
actus qui modo contrarius non sit, nihil impedit
quo minus duo rei sunt:]

I. [fideiussor quoque interrogatus inter duorum reorum
responsa si responderit, potest videri non impedire
obligationem reorum:]

K. [quia nec longum spatium interponitur, nec is actus
qui contrarius sit obligationi.]

This fragment as it stands is perplexing in the highest degree, but if my suggestions as to its restoration are in any way well founded, it assumes the utmost importance for the proper understanding of the ~~correal~~ stipulation and likewise of certain points regarding the accession of a fideiussor.

In the first place let us look at period 7. .
So far as I am aware, no one has yet succeeded in giving this passage a rational interpretation. What it states is that 'duo rei doubtless can be so constituted that a period of time is fixed (lit. consideration is had of a time) within which both shall reply,' The term 'constitui' is inappropriate, but if we substitute 'interrogari', the idea at once suggests itself that Julian is here reproducing the framework of a ^{stipulatory} ~~common~~ formula. Now what can the purpose be of thus fixing a period of time ~~wh~~ within which both debtors must reply? Only this, I venture to think, namely, to ensure that the one debtor shall not be bound without the other. Hence I conjecture ~~that~~ after 'respondeat' Julian proceeded somewhat as
~~xxxxxxx~~

1) *super* p. 98

2) *infer* p. 221 //

follows: et nisi intra tempus statutum utriusque responsum secutum fuerit, neuter teneatur. Thus if ~~Myxand~~ T. interrogates M. and S. correally, and M. replies within the time fixed, but S does not, M. is not bound as he otherwise would have been. In support of this conjecture it may be observed that the 'et' between 'ut' and 'temporis' is meaningless as the period stands, but if after ~~ixxxxx~~ 'respondeat' we add another 'et'-clause also governed by 'ut', and assume that the two ~~ix~~'et's' mark two clauses ~~ix~~ in a formula which is here outlined, the period acquires a perfect concinnity.¹⁾ Thus we arrive at the ^{special} correal formula already given.¹⁾ This restoration, which in spite of its highly conjectural character makes, as every one must admit, uncommonly good sense, implies that period η . originally followed immediately after α . , and we accordingly transfer ^{it} ~~to~~ to β .

In the second place, I believe that period ι . contains the remnants of a period \jmath . which originally preceded δ . Discussion of this conjecture I must reserve for my future treatise on Accessoriality, as it depends on certain technicalities affecting the ~~relax~~ ^{differ} relation of principal₁ and fideiussor.

In the third place, the initial 'sed' in \jmath . suggests a preceding context which the compilers have deleted. I conjecture that the antithesis may have been between a simple reply 'spondeo' given to an active correal interrogatory, and a reply expressly given to one of the co-creditors alone, e.g. 'Maevi, tibi dare spondeo'.

In the fourth place periods θ . and κ . are without doubt to be attributed in their ~~x~~ entirety to the compilers; we shall deal with them in connection with the Justinianian law.²⁾

1) *supra*. p. 98

2) *infra*. p. 221 ff.

Meanwhile, assuming the substantial soundness of our reconstructions, let us try and understand the procedure adopted by the compilers as regards this fragment.

The pr. § 1 and § 2 represent three separate heads of discussion which ~~followed~~ presumably followed one another in the same order in the fifty second book of Julian's Digest. In the case of each the compilers ~~have~~ deleted part of the original decision as obsolete.

None of the three heads of discussion had anything to do with the requisite of continuous actus, but the compilers thought this a suitable occasion to set forth

the new theory devised by them regarding this requisite in its application to the correal stipulation, especially as the deleted periods β and γ seemed capable of adaptation for this purpose. Accordingly they appended a new § 3, made up partly of elements taken from β and γ but entirely repugnant to the classical law.

to restore thus:

Qui praesens interrogavit, si antequam sibi respond-

(3)

~~12~~ D. (45.2) 12 pr. Venuleius II stip.

α . Si ex duobus qui [promissuri]¹⁾ sint, [hodie]²⁾ alter, alter [postera die]³⁾ responderit, Proculus: non esse duos ~~reos~~ reos ac ne obligatum quidem intellegi eum qui [postera die]³⁾ responderat;

-
- 1) interrogati
 - 2) comminus
 - 3) ex intervallo

- 4) the MSS reading is 'prolutus', but the emendation 'Proculus' is universally accepted; 'ait' must be understood.

7) respondisset

10) ait vero praesens interrogavit

11) discessit et

12) obligat: intervallum enim medium non vitiavit oblig-

ationem.

125 105 { 15 ctd
 β. [cum actor] ~~ad~~ ad alia negotia ²⁾ discesserit [vel]
 promissor ³⁾ licet [peractis illis rebus] ⁴⁾
 responderit.
 γ. <->

By far the most troublesome of the formal re-
 quisites of the stipulation is that of continuous actus.
 The general principle is stated in Venuleius D. (45.1)
 137 pr. which I have ventured to restore thus:

Continuous actus stipulantis et promittentis esse debet
 [-] ⁵⁾ et <stricta iuris ratione> comminus responderi
 stipulanti oportet. ceterum <hodie constat> ~~inter~~
 si post interrogationem <uterque praesens manserit>
 nec alter ad aliud ⁶⁾ accesserit <negotium> [-] ⁷⁾
 <promittentem teneri> quamvis [-] ⁸⁾ <ex intervallo>
 spopondisset. ⁹⁾

The rule of continuous presence was, I believe;
 stated by Ulpian in D. (45.1) 1.1, which I have ventured
 to restore thus:

Qui praesens interrogavit, si antequam sibi respond-
 eretur discessit, inutilem efficit stipulationem
 <quamquam> ¹⁰⁾ mox [-] ¹¹⁾ reverso responsum est [-] ¹²⁾

- 1) sed hodie alio iure utimur: nam si post aliquem ab aliquo interrogatum alter nec
- 2) accesserit nec ab altero
- 3) tenebitur
- 4) ex intervallo
- 5) (ut tamen aliquod momentum naturae intervenire possit)
- 6) acceperit Donell.: occeperit
- 7) nihil proderit
- 8) eadem die
- 9) ? respondisset
- 10) sin vero praesens interrogavit
- 11) discessit et
- 12) obligat: intervallum enim medium non vitiavit oblig-
ationem.

The first point ^{we} note in period α. of our present pr. is that the compilers have almost certainly substituted 'promissuri' for 'interrogati'; the reference to α. response (responderit) without a previous reference to an interrogatory would from the classical standpoint be altogether anomalous, for the interrogatory was the ²predominating element in every stipulatory formula. The fact of this substitution is important as affording a clue to the restoration of other texts.

In the second place period α., as it stands, inevitably founds an argumentum e contrario to the effect that in the case of a passive correal stipulation the requisite of continuous actus is satisfied if both debtors reply before the expiration of the day when the question is put. But we may with the utmost confidence deny that the classical jurists ever laid down such a rule. It seems in the highest degree probable that Venuleius wrote 'comminus' and 'ex intervallo' respectively in the places now occupied by 'hodie' and 'postera ~~xxxx~~ die' (bis). So restored, period α. contains a quotation from Proculus to the effect that both answers must follow immediately on the interrogatory; if either makes any appreciable delay in replying, he is not bound at all.

According to my suggestion, Venuleius quoted Proculus merely to point out ~~xxx~~ that the view of the latter was no longer generally accepted; the mature classical law held that the mere elapse of an interval between different steps in a stipulatory act was immaterial provided both parties remained constantly present and neither turned to any other business. Period β. as restored by me, sets forth this principle as applied to the ordinary case of a simplex stipulation.

I next conjecture that Venuleius applied the same principle to the correal stipulation in a following

period *y.* which the compilers have omitted. If T. interrogates M. and S. correally and M. replies at once, S. after an interval, then, if T., M. and S. remain constantly present and abstain from all other business until S. has replied, a correal obligation is duly established. So far the application of the principle is simple; but there is a possibility that Venuleius went on to discuss certain more complicated ~~questions~~ questions which might arise in this connection. For example, If M., having given his answer goes away before S. gives his, quid iuris? Any further speculation on such matters would however be futile.

We shall again mention this pr. in connection with the Justinianian law ¹⁾ if the stipulation has not been fulfilled.

The question now arises, if a correal stipulation is materially effective to bind one of the co-debtors, or entitle one of the co-creditors, but is materially ineffective to bind or entitle the other, is a valid simplex obligation created? Whatever the old civil law might have had to say on such a point, there can be no doubt that the classical jurisprudence gave an affirmative answer.

- 1) ~~vide supra p. 223~~ *supra p. 223*
- 2) ~~supra p.~~
- 3) Gaius (§ 102) includes in these the rule of acquiescence which we have treated as a formal constitutive requisite.
- 4) The term 'inutilis' is a perfectly general one and may connote the failure either of a constitutive or of an effective requisite.
- 5) In the case of a stipulation from a pupil (or woman) without his tutor's auctoritas, there is antinomy on the question whether the pupil is bound 'naturally'; see Girard, p. 584 n. 3; but this question does not concern us here; without doubt the stipulation is civilly ineffective.
- 6) *notably the various Sabinian constitutions, Ricardus, 255, 35 p. 246 ff.*

The effective requisites of the stipulation in general are dealt with ~~by Gai.~~ in Gai. § III. 97-109,¹⁾ the method of treatment adopted here and in other juristic writings being to consider the various circumstances under which a stipulation is 'inutilis'.²⁾ For example, (a) ~~if~~ a party stipulates from a pupil or a woman without his or her tutor's auctoritas; (b) a party stipulates for a prestat-
ion to be rendered after his own or the promisor's death; (c) a party stipulates for a thing which belongs to him-
self. In each of these cases, assuming that all the constitutive requisites are fulfilled, it cannot be denied that a stipulatory act has been regularly accom-
plished, yet the substantive law holds the act ineffect-
ive to produce an obligation.³⁾ Therefore we say that in each case an effective requisite of the stipulation has not been fulfilled.

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2) notably the various *Sabinus commentaries*,²⁴ Riccobono, 255, 35. p. 246 ff.

But further, the case of a correal stipulation may give rise to the following delicate situation: Suppose a correal stipulation to be unimpeachable so far as its constitutive requisites are concerned; suppose also that, if either of the co-creditors or co-debtors be eliminated, it is effective to entitle or bind the other; but suppose that it is not effective to establish a correal obligation. This situation may ~~arise~~ arise ~~xxx~~ under two circumstances: (i) where there is a latent defect in the stipulation which renders the two obligations materially unequal, and (ii) where the prestation stipulated ~~for~~ ^{or materially} is 'individualised' by the person of the particular creditor or debtor.

(i) The simplest example of the first case is where M. and S. stipulate correally: 'decem ~~xxxxStichum~~ et (aut) Stichum dari, but Stichus belongs to one of them, say M. Here if we eliminate S., a valid simplex obligation decem dari is established in M.'s favour, and if we eliminate M., a valid simplex obligation decem ~~xxx~~ et (aut) Stichum dari is established in S.'s favour; but the inequality between these two obligations clearly excludes the possibility of their identification. We must therefore lay down the rule that a correal stipulation in order to be effective for the fulfilment of its proper end, to wit, the establishment of two obligations correally related, must be free from any latent defect which renders these obligations materially unequal.

(ii) As examples of the second case the following may be cited:

M. and S. stipulate correally for the same usufruct. Now a usufruct is, as a rule at least, 'individualised' by the person of the particular usufructuary, so that a ~~usufruct~~ usufruct constituted in favour of M. is incapable of identification with a usufruct constituted in favour

~~~~~

of S. Hence, though if we eliminate S., a valid ~~stipulation~~ simplex obligation is established in M.'s favour and vice versa, yet it is impossible that the correal stipulation can produce two obligations correally related. The fact of the prestation being 'individualised' by the person of the particular creditor excludes the possibility of identification. ~~where one only of the two~~

(b) M. and S. stipulate correally for the same sum dotis nomine. As a dos is 'individualised' by the ~~particular~~ person of the particular husband, identification is excluded on the same ground as in the preceding case.

(c) M. and S. promise correally the same services. Here the prestation, more especially if the services are of a ~~expert~~ ~~skilled~~ nature, is 'individualised' by the person of the particular debtor, for the quality of <sup>work</sup> depends <sup>essentially</sup> on the intelligence and skill of the workman. Accordingly on the same ground as before, identification is excluded.

We must therefore lay down the further rule that a correal stipulation, in order to be fully effective, must not contain a prestation which, being individualised by the person of the particular creditor or debtor, renders the two obligations materially non-identified.

The question is, what result ensues if either of these effective requisites be not fulfilled, - if a correal stipulation does contain a latent defect or an individualised prestation, which induces material inequality or non-identification? The old civil law, I believe, would have had no alternative but to pronounce the stipulatory act wholly 'inutilis', but as we shall see ~~later~~ later, there are good grounds for holding



(1) that the mature classical jurisprudence here introduced the doctrine of simple solidarity.

We reserve all <sup>vr</sup> further discussion of these cases of material inequality and non-identification for our chapter on Simple and Equitable Solidarity ex stipulatu. 1) In the following section we shall merely consider two passages bearing on the case where one only of the two obligations which a regularly constituted correal stipulation purports to create, is valid.

1) *infra* p. 152 ff

- 1) postea et ante stipulatu et ante stipulatu
- 2) vs
- 3) et a stipulatu et ante stipulatu
- 4) et a stipulatu et ante stipulatu
- 5) quod et a stipulatu et ante stipulatu
- 6) vel ante stipulatu
- 7) quod et a stipulatu et ante stipulatu
- 8) et a stipulatu et ante stipulatu
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- 98) et a stipulatu et ante stipulatu
- 99) et a stipulatu et ante stipulatu
- 100) et a stipulatu et ante stipulatu

- (1) D.(45.2)12.1. Venuleius II stip.  
 Si a Titio <-><sup>1)</sup> [et] pupillo <-><sup>2)</sup> sine tutoris auctoritate  
 <-><sup>3)</sup> stipulatus fuero eadem decem, [vel a servo] et  
 quasi duos reos promittendi constitui obligatum  
 [Titium] <-><sup>4)</sup> solum <+><sup>5)</sup> Iulianus scribit, quamquam  
 si servus <-><sup>6)</sup> ~~spoponderit~~ spoponderit <-><sup>7)</sup> in  
 actione de peculio eadem observari ~~de~~ debent ac si  
 liber fuisset.

It does not take much critical ~~insight~~ insight to  
 perceive that the compilers have here played havoc with  
 Venuleius's ~~original~~ text. As the notes indicate, I  
 believe this paragraph originally referred to the  
 relation of principal debtor and sponsor(or fidepromiss-  
 or) and its detailed examination is therefore reserved  
 for my future treatise on Accessoriality. Meanwhile we  
 merely note the clause 'quasi duos reos promittendi  
 constituiss<sup>em</sup>'.

Suppose I stipulate correally thus:

~~Ti~~ Titi, post mortem meam (~~tuam~~) decem dari spondes?  
 Maevi, ~~eadem~~ eadem decem dari spondes?

- 1) post meam eiusve mortem vel a muliere
- 2) ve
- 3) et a sponsore vel fidepromissore
- 4) esse sponsorem vel fidepromissorem
- 5) quasi duos reos promittendi constituiss<sup>em</sup>
- 6) vel peregrinus
- 7) quaeritur an pro eo sponsor vel fidepromissor obliget-  
 ur: plane si ex iusta causa alio verbo quam 'spondes'  
 a servo stipuler

Gal. III. 100.

7.

but vide infra p. 157. n. 1.



Here the stipulation from T. is in diem (incertum), that~~x~~ from M. is pure, but as we have seen the validity of the correal stipulation is not prejudiced by this modal discrepancy.

The question to T., ~~XXXXXX~~ however, though formally unimpeachable, is ineffective ~~on~~ on account of the substantive rule which forbids ~~XXXXXX~~ 'ab heredis persona incipere obligationem'.<sup>1)</sup>

But the elimination of T. does not prevent the creation of a valid simplex obligation between myself and M.

Likewise if in place of T., we have a woman or pupil who promises without the auctoritas of her or his

tutor, my stipulation from M. is valid. It need hardly be remarked that M.'s obligation in each case is for the full X; the distributive interrogatory excludes any possibility of partition.

(2)

~~(2)~~ D. (45.1)128. Paul. X quaest.

α. Si duo rei stipulandi ita extitissent ut alter utiliter, ~~XXXX~~ alter inutiliter stipularetur, ei ~~x~~ qui non habet promissorem obligatum, non recte solvitur, quia non alterius ~~xx~~ nomine ei solvitur, ~~xx~~ sed suae obligationis quae nulla est.

β. eadem ratione qui Stichum aut Pamphilum stipulatur, si in unum ~~xxx~~ constiterit obligatio, quia ~~x~~ alter stipulatoris erat, etiamsi desierit eius esse, non recte solvitur, quia ~~xxx~~ utraque res ad obligationem ponitur, non ad solutionem.

Period<sup>β</sup> does not here<sup>2)</sup> concern us, except in so far as it indicates that in ~~x~~ Paul was thinking

<sup>1)</sup> Gai. III. ~~xxx~~ 100.

<sup>2)</sup> ~~cf.~~ ~~but vide~~ infra p. 167. n. 1.

not so much of the case where the stipulation of one of the creditors was formally void, as of the case where such stipulation was ineffective on material grounds. More particularly he seems to have been thinking of such a stipulation<sup>as</sup>:

M.: Titi, Stichum dari spondes?

S.: Titi, eundem Stichum dari spondes?

where Stichus was, in point of fact, the <sup>p</sup>roperty of say M. A valid simplex obligation is here created between S. and T., but M. is entirely eliminated, so that solutio cannot be made to him.

The motive which Paul gives for his decision in (quia non...) is instructive. Apparently some were inclined to argue that since M. and S. were formally constituted correal creditors, M. was entitled to receive solutio ~~in~~ in the name of S., though his own obligatory right was materially void.<sup>1</sup> But Paul rejects this argument. A correal creditor is entitled to solutio in his own name, not in that of the other correal creditor; hence if his obligatory right is non-existent, solutio cannot validly be made to him.

*The fact that such a decision was necessary seems to show that even in the <sup>late</sup> classical period, the principles governing action correalit were subject to some doubt.<sup>11</sup>*

*1) vide supra p. 22; infra p. 132, 134.*

*ded., otherwise ~~indirect~~ 'direct' and 'indirect' consumption. Another way of describing the position*

*11) It is altogether fallacious to describe 'indirect' consumption as 'praetorian', 'honorary' or 'equitable'; true it owed its introduction to the activity of the praetor, but long before the mature classical period it had been 'received' into the civil law. On the points here dealt with I would refer the reader to the title Grundzüge d. Processconsumption in Levy, Rom., p. 46 ff. The vexed question whether there was only a single exception rei iud. vel in iud. ded., or two exceptions rei iud. and rei in iud. ded., respectively does not here concern us.*



It is clearly impossible for us to attempt here any exhaustive exposition of the Roman institute of process-consumption, and we must presume that the reader is generally acquainted with its principles.

The fundamental idea is stated by Gai. III. 180-1; IV. 106-7, passages which open up a wide field of speculation. Confining ourselves to actions in personam, we note the rule that litiscontestatio in a iudicium legitimum with an intentio iuris civilis consumes the obligation absolutely, so that if any further action is brought on the same obligation (de eadem re, de eodem debito = ~~eadem~~ de eadem obligatione), the iudex is bound to absolve the defendant without the necessity of any exception, the obligatory relation being now extinct. On the other hand litiscontestatio in any iudicium imperio continens or in a iudicium legitimum with an intentio in factum does not consume the obligation, and hence if a further action be brought de eadem re, the iudex cannot absolve the defendant on the ground that by virtue of the previous litiscontestatio no obligatory relation now exists; if the previous litiscontestatio is to operate as a bar to a second action de eadem re, <sup>the insertion of</sup> an exceptio rei iudicatae vel in iudicium deductae <sup>in the formula of the latter action</sup> is essential.

Thus we have two modes of process-consumption admitted by the later civil law: consumption ipso iure and consumption ope exceptionis rei iud. vel in iud. ded., otherwise <sup>called</sup> ~~described as~~ 'direct' and 'indirect' consumption. <sup>1)</sup> Another way of describing the position

1) It is altogether fallacious to describe 'indirect' consumption as 'praetorian', 'honorary' or 'equitable'; true it owed its introduction to the activity of the praetor, but long before the mature classical period, it had been 'received' into the civil law. On the points here dealt with I would refer the reader to the title Grundzüge d. Processkonsumption in Levy, Konk., p. 48 ff. The vexed question whether there was only a single exception rei iud. vel in iud. ded., or two exceptions rei iud. and rei in iud. ded. respectively does not here concern us.

is to say that in the one case there is consumed the creditor's obligatory-right itself so that his action-right necessarily disappears, whereas in the other case the consumption merely covers his action-right, his obligatory-right being left intact. The distinction between these two modes of consumption was however/purely technical nature, and did not ~~not~~ need to be insisted on continually in the course of juristic exposition. Hence apparently for sake of convenience the exceptio rei iud. vel in iud. ded. was regularly ~~spoken~~ mentioned as the organ of process-consumption, even where there was no suggestion/~~that~~ of the first action being other than a iudicium legitimum with intentio iuris civilis.<sup>1)</sup> This manner of expression is all the more ~~x~~ intelligible if we assume an exceptio rei iud. vel in iud. ded. to have been employed as a matter of common form ob maiorem cautelam even where it was strictly speaking 'supervacua.'

Now the question whether or not the defendant in one ~~an~~ action can obtain absolution (whether ~~an~~ ipso iure or ope exceptionis rei iud. vel in iud. ded.) on the ground of litiscontestatio in a previous action, must be decided according as the second action is or is not de eadem re ~~with~~ with the first. The expression 'eadem res' therefore must have a technical significance which demands investigation. This brings us to the somewhat remarkable

fact that nowhere in the sources have we any definition of this expression as applied distinctly to actions in personam. All the definitions that ~~we~~ we have refer to actions in rem, and I cannot regard Levy's attempt to

- 1) See e.g. D. (44.2) 11.9; Levy, Konk., p. 61 ff.; Levy
- 2) See e.g. Ulpian. D. (44.2) 7.1, 4; Paul. D. eod. 12, eod. 14 pr. with Ulpian. eod. 13; Neratius eod. 27.
- 3) Konk. op. cit. p. 78 ff.



discover in these definitions the principle applicable to actions in personam ~~as very successful~~. In point of fact as Levy<sup>1)</sup> himself emphasises, personal and real actions must pursue different courses as regards consumption. In the case of real actions consumption had its basis in the old maxim, preserved to us by Quinctilian<sup>2)</sup>, 'bis de eadem re ne sit actio', which, as Gradenwitz<sup>3)</sup> seems to have demonstrated, had no application to actions in personam; as regards the latter the fundamental principle was 'tollitur obligatio litis ~~con-~~ contestatione'.<sup>4)</sup>

The absence of any clear information regarding the technical significance of 'eadem res' as applied to actions in personam, may, I think, be explained as follows: X 'Eadem res' is here precisely equivalent to 'eadem obligatio' or 'idem debitum'.<sup>5)</sup> The question of 'eadem res' or 'alia res' simply resolves itself into this, <sup>namely, is</sup> ~~was~~ the second action based on the same obligation (debt) as the first action or on a different obligation (debt)? <sup>clearly</sup> ~~and~~ this question <sup>cannot</sup> ~~could not~~ be separated from the details of the formulary system which the compilers naturally omitted as far as possible.

We have indeed quite sufficient information to enable us to see how the position worked out in practice,

1) ~~inst.~~ op. cit. ~~51~~ p. 51

2) Inst. Or. 7.6.4.

3) Volksspruch u. Kunstregel bei d. Konsumtion in Aus rom. u. bürgerl. Recht, (Festschrift f. Bekker, 1907) p. 385 ff.

4) It is now proved beyond doubt that the statement of Gaius D. (50.17) 57: 'bona fides non patitur ut bis idem exigatur,' had nothing to do with civil consumption; Levy { op cit. p. 49 n. 1

5) cp. Gai. III 181, 'ut si...debitum petiero, postea de eo... agere non petiere; IV. 107, 'si... actum est...postea... de eadem re agi non potest.'

Gai. III. 131, 131a being particularly valuable in this connection. Consider the following case: M. sells a piece of land to T. and agrees to mancipate the property on the following day and to give vacant possession a ~~month~~ month hence; he fails to mancipate and T. therefore sues him in an *actio empti* thus: *quod Titius de Maevio fundum quo de agitur emit, qua de re agitur, quidquid ob eam rem Maevius Titio dare facere oportet ex fide bona, eius, iudex, etc.*<sup>1)</sup> We assume that this action is brought before the expiration of the month allowed for the delivery of vacant possession, so that all T. can ~~obtain in this action~~ <sup>recover</sup> is damages in respect of M.'s failure to mancipate. Then the month expires, and M. fails in his further duty to give vacant possession; in such case T.'s only remedy is to bring another *actio empti*. But this second action will have precisely the same formula as the first; its *demonstratio* will set forth the same contract of sale, and its *intentio* the same uncertain claim '*quidquid Maevium Titio dare facere oportet ex fide bona*'. Hence there can be no doubt that this second action is de eadem re with the first, and is therefore excluded by the process-consumption rule. In order however to restrict the operation of process-consumption, the classical jurisprudence devised the plan of inserting a *praescriptio* '*ea res agatur de fundo mancipando*' in the formula of the first action, so that the way was left open for a subsequent *actio empti* on the same sale, this second action being now technically de alia re from the first.

Again consider Paul. D. (44.2)22 i.f.: *et si actum sit cum herede de dolo defuncti, deinde de dolo heredis ageretur, exceptio rei iudicatae <vel in iudicium*

<sup>1)</sup> Lenel, *Edict.*, p. 289.



deductae > non nocebit, quia de alia re agitur. If T. deposits an article with M., and the latter dies leaving S. as his heir, and T. alleging that M. has been guilty of dolus, brings an action thus: quod Titius apud Maevium defunctum mensam argenteam deposuit, qua de re agitur, quidquid ob eam rem Seium, heredem Maevii, dare ~~facere oportet~~ facere oportet ex fide bona, eius, iudex, etc., then undoubtedly the entire obligatio depositi is consumed, and T. cannot bring ~~another~~ a further action on the ground of dolus on the part of S. himself. In order to prevent this result a praescriptio 'ea res agatur de dolo Maevii defuncti,' must be inserted in the formula of the first action, so that the second action de dolo Seii heredis becomes technically de alia re. Or, alternatively, the formula of the first action must be conceived in factum: si paret Titium apud Maevium defunctum mensam argenteam deposuisse eamque dolo malo Maevii defuncti redditam non esse etc. Here again this formula has no effect in excluding a subsequent action on the ground of S.'s dolus, the operation of the (indirect) process-consumption being expressly restricted.<sup>1)</sup>

The application of what has just been said to the correal obligation is now simplicity itself. Where two obligations are correally related, litiscontestatio in an action on the one consumes the other, directly or indirectly, because both obligations are una atque obligatio or res, -the object of each is unum atque idem debitum. The use of the term 'res' as equivalent to 'obligatio' is perfectly well authenticated,<sup>2)</sup> and the use

<sup>1)</sup> see Levy, Konk., p. 95 n.4.

<sup>2)</sup> see e.g. Ulpian. D.(5.1)18.1 i.m.: si res non ex maleficio veniat, sed ex contractu.

(see Levy, Konk., p.101 ff.)

of 'eadem res' as a technical term denoting ~~the~~ the constructive unity of two obligations for purposes of process-consumption is therefore quite natural. Hence when we have two obligations correally related, the actions which sanction the same are properly described as 'de eadem re', this description, as technically employed, being equivalent to a statement that the two actions stand ~~in~~ to one another in a process-consumption relation.

The expression 'de eadem re' was not however always used in the technical sense just described. Thus in Ulpian. D.(19.1)10: non est novum ut duae obligationes in eiusdem persona de eadem re concurrant,<sup>1)</sup> the words 'de eadem re' can only mean 'concerning the same specific thing'. Accordingly 'duae obligationes de eadem re' are 'two obligations having the same determinate species as their common prestation-object', nothing being here implied as ~~to~~ to whether their relation is correal or cumulative.<sup>2)</sup>

Against one common practice of modern writers I must here enter a protest, the ~~the~~ practice namely of employing the phrase 'obligations de eadem re' as a technical description of two obligations correally related; according to this usage the 'res' signifies, not merely the prestation-object, but the prestation ~~or~~ or obligation-object itself, and the phrase quoted signifies 'obligations with one and the same prestation as their common (obligation-)object'. So far as I am aware

1) I must maintain the genuineness of <sup>this passage</sup> ~~these words~~ as against Levy, Konk., p. 456 ff.

2) Another untechnical use of 'de ~~res~~ eadem (ea) re' is found in Ulpian. D.(44.2)5 which in its original form referred to vadimonium: here the phrase in question simply means 'on the same material ground of action'; see Levy, Konk., p. 101 ff.



there is no authority in the sources for this usage. It is only two actions that can properly be described as 'de eadem re' in the technical sense of the process-consumption rule. The phrase 'in utraque obligatione una res vertitur' will be explained in our discussion of Inst.III. 16.1 in the next section.

Thus we attain a full comprehension of correality as a relation founded on the entirely artificial and formal basis of process-consumption. The very formality and artificiality of this basis proves it, we may ~~almost~~ venture to say, with absolute certainty to have been the root out of which the whole institute of correality originally sprung. The correal stipulation must have been deliberately devised by the conditores iuris antiqui for the purpose of establishing a constructive unity of obligation which would allow process-consumption to operate extensively. ~~Had the early Roman law been~~

~~Naturally, after they had succeeded in constructing a correal relation in which litiscontestatio had an extensive consuming effect, the early jurists were bound to attribute a like effect to acceptilatio which we assume to have been originally indispensable to the discharge of an obligatory relation ex stipulau without action. Then when the material fact of solutio became endowed per se with the capacity of extinguishing such an obligatory relation, the jurists were bound to attribute extensive consuming effect to it also. Thus in the classical law, acceptilatio and solutio stand side by side with litiscontestatio as agents in consumption consuming a correal obligation, - each of them has an equal power of effecting a civil consumption. But, as~~

able to devise an institute of solidarity based on solutio-consumption, the extensive consuming effect of litiscontestatio would be an anomaly which could not be explained. If however we assume the institute of

correality as we find it portrayed in the writings of the classical jurists to have been evolved from a manipulation of the stipulatory formula made with the express design of employing the principle of process-consumption for solidary ends, the whole position becomes ~~xxxxx~~ plain.

Naturally after they had succeeded in constructing a correal relation in which litiscontestatio had an extensive consuming effect, the early jurists were bound to attribute a like ~~effect~~ effect to acceptilatio which we assume to have <sup>been</sup> originally indispensable to the <sup>is</sup> discharge of an obligatory relation ex stipulatu without action. Then when the material fact of solutio became endowed per se with the capacity of extinguishing such ~~xx~~ relation, the jurists were bound to attribute extensive consuming effect to it also. Thus in the classical law, acceptilatio and solutio stand side by side with litiscontestatio as agents in consuming a correal obligation,-- each of them has an equal power of effecting a civil consumption. But as Levy<sup>1)</sup> has very clearly shown, in the writings of the classical jurists it is ~~xx~~ round process-consumption, not solutio- (or acceptilatio-) consumption that the institute of correality revolves. If two obligations as originally constituted, have different subjects on the one side or the other, and we ask whether or not they are correally related, the ~~xxxxx~~ formal test is, does litiscontestatio under the one consume the other or does it not?

On the other hand, however, it cannot be denied that by the days of the mature classical jurisprudence extensive process-consumption had long outlived its usefulness; as the institute of simple solidarity proves, the law was now perfectly capable of establishing solidary relations on the natural and material basis of

<sup>1)</sup> Konk., p. 182 ff.; I must not however be held as concurring with the whole of Levy's arguments.



solutio-consumption. Yet so deep had the idea of extensive process-consumption its roots in the legal system of Rome, that it maintained itself in full vigour throughout the whole classical period.

The obvious inconvenience of <sup>extensive</sup> process-consumption in the passive case, - in the active case it was practically harmless, - lay in the fact that if the debtor sudd turned out to be insolvent, the creditor had no recourse against the other. It was therefore necessary for the creditor in his own interests to make careful enquiry into the solven<sup>c</sup>cy of the debtors before bringing his action, and it might often be advisable for him to split up his ~~ex~~ claim <sup>between them</sup>.

But we ask, had the mature classical jurisprudence really failed to devise any means of protecting creditors against the hardship of extensive process-consumption? We at once think of the praetor's power of granting restitutio in integrum<sup>(2)</sup>, but this remedy was of an extraordinary nature and, we may be almost certain, was only applied where the ~~ex~~ creditor was a minor or had been the victim of fraud or in certain other recognised cases of a special description. Then it was always possible for the creditor to avoid taking his co-debtors bound correally, and in lieu thereof to take one of them bound as sole debtor and the other as a mandator or independent guarantor.<sup>(3)</sup> But leaving such devices aside<sup>was</sup>, was there no means of preserving the correal relation intact and yet enabling the creditor, after suing the one debtor, to have recourse

~~vide infra p.~~

(4) cp. Paul.D. (15.1)47.3; 'resciso superiore iudicio'; Levy, Konk., p. 261 ff.

24) vide infra p. 154 ff. 158 ff., 184 ff.

3) vide infra p. 157 ff. 159 ff., 179 ff.

against the other? If my conjectures regarding Papinian.<sup>1)</sup> D.(45.2)11 pr. be well founded, the classical jurists had discovered such a means in the process of *mutua fideiussio*. After taking the co-debtors bound correally, the creditor could, by taking them bound in addition as fideiussors for one another, practically avoid any hardship arising from <sup>the</sup> extensive ~~process~~ consuming effect of *litis-contestation*.

One means of excluding extensive process-consumption mentioned by Justinian in C.(8.40(41)28 cannot, in my opinion, have been available in classical times, namely a special pact providing for such exclusion. Extensive process-consumption was a civil law consequence and I hold it quite impossible for this consequence to be avoided by a simple agreement of parties. On this point we shall have more to say when we come to deal with the Justinianian law.<sup>2)</sup>

The concluding point with which we shall deal in this chapter is the relation between process-consumption on the one hand and election and occupation on the other.<sup>3)</sup> The all ~~important~~ important fact is that the terms 'eligere' and 'occupare' have essentially a substantive, not a processual, significance; the statements that the creditor 'elects' one of his correal debtors, ~~or~~ that one of the correal creditors 'occupies', have in themselves nothing to do with *litiscontestatio* or process-consumption. 'Election', as an accomplished fact, properly ~~means~~ means nothing more than that the creditor has

<sup>3)</sup> On this matter I would refer the reader to the excellent remarks of Levy, *Konk.*, p. 48 ff. 377.

1) *infra* p. 139 ff.

2) *infra* p. 226.



evinced an intention to proceed against a particular one of his correal debtors for the whole debt, and <sup>pass</sup> let the others go <sup>by</sup> ~~scot-free~~; 'occupation', as an accomplished fact, properly means nothing more than that one of the correal creditors has taken some step which ~~concentrates the entire right under the obligation~~ ~~gives him a preferential right to the whole debt and so excludes the others.~~ The statement that the creditor in a passive correal obligation has an 'election' simply means that he has a power of proceeding against any one debtor for the whole debt at his free choice; the statement that any one creditor in an active correal obligation is in a position to 'occupy' simply means that he has the power of securing for himself a preferential right to the whole debt.

An election is however inchoate until it has been perfected by litiscontestation with the debtor elected; the whole point of electing at all is the anticipation of joining issue ~~with~~ and once issue is joined the other debtors are freed. Hence we find passages in which the classical jurists use such terminology as 'election of one debtor frees the other'; see for example Paul. (9.4)24; 26 pr.: in quo casu electio est actoris cum quo velit agere....electio vero alterum liberabit. In such cases, however, the context makes it clear that not election per se, but election perfected by ~~litiscontestation~~ ~~litis~~ ~~contestation~~ is the liberatory agent.

On the other hand we must avoid the error of supposing that the classical jurists ever used ~~the term~~ 'electio' as a technical processual term equivalent to litiscontestation. Certainly in the example last quoted one might at first sight be tempted to translate 'electio vero alterum liberabit' by 'but litiscontestation

will free the other'. This translation would however be inaccurate; the preceding clause shows 'electio' in its proper ~~exclusive~~ sense of a substantive right on the creditor's part of electing which debtor he will sue, and 'electio' in the second clause last quoted must still bear the same substantive meaning; only we must now understand that the right of election has been duly exercised and perfected by litiscontestation. The bald use of 'electio' in <sup>place</sup> ~~the sense~~ of 'litiscontestation' belongs ~~exclusively~~ to the Justinianian law in which substantive and processual ideas and terms were confused. <sup>had largely superseded those of a processual order</sup> Likewise in the active case when it is said that one of two correal creditors has 'occupied', we naturally think of litiscontestation as the means by which this occupation has been achieved. There is, however, no necessary connection between occupation and litiscontestation. In the case of certain ~~non~~ non-correal relations where there is a conflict of claims, the 'occupant' is not the claimant who first joins issue, but he who first obtains judgment. But even where it is stated that one of two creditors occupies by litiscontestation, this statement does not necessarily imply the operation of extensive process-consumption. The law may quite well confer on the creditor who first joins issue, say M., a preferential right to the prestation without thereby holding the obligatory right of the other, say S., extinguished. In such a case, if M. joins issue collusively or fails to prosecute the action duly, he may be deprived of his preference so that S. can now bring his action. On the other hand where extensive process-consumption operates, the right of S. is absolutely extinguished in any event.

1) see Levy, Konk., p. 45, n. 5; *infra* p. 227 n. 1

2) *infra* p. 227 n. 1  
cp. for example, Gaius D. (15.1) 10 i. f.; Levy op. cit. p. 377 n. 6.



(1) Inst. III.16.1.

α. Ex huiusmodi obligationibus et stipulationibus solidum singulis debetur <sup>et</sup> promittentes singuli in solidum tenentur;

β. in ~~una~~ utraque tamen obligatione ~~ex~~ una res vertitur:

γ. ~~et~~ <->

δ. et vel alter debitum accipiendo vel alter solvendo ~~omnium~~ omnium peremit obligationem et omnes liberat.

In the ~~pr.~~ pr. of this title, as we have already seen, the proper form for concluding a correal stipulation is given. In the present paragraph the matter is looked at from the opposite standpoint; a correal stipulation is deemed to be concluded in the form given and the effects of such stipulation are now laid down. In all probability the original of the entire title III.16 is Florentine's Institutes, and we must keep before us the elementary nature of the latter work in construing this paragraph.

In period α, the term 'obligationibus' is <sup>equivalent to</sup> ~~used in the loose sense of~~ 'stipulationibus', and the phrase 'ex huiusmodi obligationibus' then means 'from the two stipulations "Maevi, decem dari spondes? spondeo" and "Sei, eadem decem dari spondes? spondeo" (and similarly in the active case)', which two stipulations are run together so as to form a single joint stipulation in distributive form. Period α. therefore signifies that the joint stipulation by virtue of its distributive form renders each co-creditor or co-debtor entitled or bound in respect of a full sum of X and not merely pro rata.

Period β. then goes on to say that though each of the two obligations (stipulations) has as its prestation-object a full sum of X, yet the two sums are one

1) *infra* p 66 ff.

and the same. The phrase 'una res' seems to connote ~~simply~~ simply the identification of the two prestation-objects, and the form of expression here adopted for the purpose of expounding the correal is perfectly justifiable, so long as we are not referring to the case of a stipulation for a determinate species. As we have seen,<sup>1)</sup> where two obligations have ~~xxx~~ equal generic prestation-objects, ~~xxx~~ and these prestation-objects are identified as one and the same, this identification (equality of prestation-content being assumed) produces identification of the two prestations, in other words it produces an objective identity between the two obligations. If however the common prestation-object of the two obligations were specific, e.g. the same slave Stichus, the statement '~~xxxxxxxx~~ in utraque obligatione una res vertitur' (where the 'una res' is Stichus) would not suffice to express the existence of a correal relation between the two obligations; for any number of quite independent obligations may have the same determinate species as their ~~x~~ prestation-object, - may be 'de eadem re' in the untechnical sense.

The foregoing remarks proceed on the understanding of the 'res' in period  $\beta$  as merely the prestation-object, not the prestation (obligation-object) itself, and this interpretation I believe to be in harmony with the terminological usage of the classical jurists. Period  $\beta$  must therefore be considered merely as an elementary indication of the objective unity involved in the correal relation, and not as a fundamental exposition ~~thereof~~ thereof; such an exposition would have to take into account the case where the prestation-object is a determinate species.

1) *supra* p. 78 f.



(2) Period  $\delta$  sets forth the rule of solutio-consumption, and there is nothing to indicate that it is not substantially of good classical origin.<sup>1)</sup> On the other hand it is almost incredible that Florentine would have omitted all reference to process-consumption, and we may therefore conjecture with fair certainty that the compilers have deleted a period  $\gamma$  dealing with this matter. In point of fact <sup>2)</sup> can hardly fail to perceive that the sequence of  $\beta$  and  $\delta$  is defective. The solutio-consumption rule is clearly meant to be a deduction from the 'una res', and accordingly we miss some such word as 'ideo'; again the change from 'una res' to 'debitum' is abrupt. If we interpose a period  $\gamma$  running somewhat as follows: 'et ideo si haec <sup>3)</sup> in iudicium deducta est, postea peti non potest, and assume period  $\delta$  to have commence 'et similiter' or the like, the abruptness is lessened and all serious difficulty removed.

plures sponsores vel fidepromissores in provincia accepti

3) ipso iure

4) cum enim lex Furia tantum in Italia locum habeat,  
evenit

1) The ~~xxxxxx~~ correlation of 'alter' and 'omnes (omnium)' <sup>cannot</sup> be treated as a serious objection.

6) pluribus fideiussores

7) compellimur, dubitatione est

8) dubitatum est

9) et puto compelli: nec refert utrum simul accepti sint  
an separatim

10) principalis

11) quam sponsores vel fidepromissores debent

12) lit. cum uno contestata omnibus

(2)

D. (45.2)3.1. Ulpian. XLVII ad Sabin.

α. Ubi [duo rei facti] <sup>1)</sup> <~> sunt, <sup>3)</sup> <-> potest vel ab uno eorum solidum peti:

β. [hoc est enim duorum reorum] <sup>3)</sup> <~> ut unusquisque eorum in solidum sit obligatus [possitque ab alterutro peti]:

γ. [et] <sup>4)</sup> <~> partes autem a singulis [peti posse nequaquam dubium est] <sup>5)</sup> <~> quemadmodum a [reo et fideiussore] <sup>6)</sup> <~> petere [possumus] <sup>7)</sup> <~> <-> <sup>8)</sup>

δ. <-> <sup>9)</sup>

ε. utique enim cum ~~xxxx~~ una sit obligatio <-> <sup>10)</sup>, una et summa est <-> <sup>11)</sup>

ζ. ut si [ve unus solvat omnes liberantur] <sup>12)</sup> <~> [sive solvatur ab altero] liberatio contingat.

1) plures sponsores vel fidepromissores in provincia accepti

2) ipso iure

3) cum enim lex Furia tantum in Italia locum habeat, evenit

4) an

5) petere, dummodo solvendo sint, ex epistula divi Hadrian  
Hadriani sit compellendus creditor, dubitatur,

6) pluribus fideiussoribus

7) compellimur, dubitatum est

8) dubitatum est

9) et puto compelli: nec refert utrum simul accepti sint an sepatatim

10) principalis

11) quam sponsores vel fidepromissores debent

12) li<sup>3</sup> cum uno contestata omnibus  
fuit





(3) D.(45.2)16. Gaius III de verb. obligat.

Ex duobus reis stipulandi si semel unus egerit,  
habeat, queritur, et quid iuris unusquisque sibi  
alteri promissori offerendo pecuniam nihil agit.  
acquisierit.

At first sight this fragment ~~■~~ seems utterly trivial;  
if litiscontestatio by one of the correal creditors,  
say M., has consumed the obligatory right of the other,  
S., how can the debtor possibly make an effective offer  
of payment to the other? Probably, however, the ~~view~~  
view which Gaius here refutes was ~~that~~ that, as  
M. and S. were originally constituted correal creditors,  
S. remains entitled to receive payment in the name of  
M., even ~~though~~ his own obligatory right has own oblig-  
atory right has been extinguished through M.'s litis-  
contestatio. Thus there is a close <sup>analogy</sup> connection between  
Gaius's decision in this fragment and that of Paul in  
D.(45.1)128 (α).<sup>1)</sup> Both passages show us that the princ-

iples governing active solidarity were exposed to some  
doubt even in the mature classical period. The passage  
next to be considered places this doubt in a still  
stronger light.

[nam debitor ab utroque liberabitur.]

1) *supra* p. 113 f.

I must maintain the genuineness of the clause 'et quid  
...acquisierit' as against Beseler, II. p. 56, whom Levy,  
Konk., p. 580 follows.

2) iudicio; Lenel, Pal., II. col. 4 1220.

3) utriusque; Beseler, l.c.

4) I must maintain the genuineness of period *p* as against  
Beseler, l.c.

5) (from *f*) debitor ab utroque liberabitur.

6) read 'eundem' (sc. communem debitorem); so Huschke, *Lindes  
Zeit schr.*, new series, II. p. 153 f.; ~~Klitz~~ Binder, p. 216 n.  
c.c.

7) dicere

8) read *eidem* (sc. communi debitori); Huschke: debitum.

9) ~~atq~~ dixerit.



(4)

~~137~~ D.(46.2)31.1. Veluleius III stip.

α. Si duo rei stipulandi sint, an alter ius novandi habeat, quaeritur, et quid iuris unusquisque sibi adquisierit.<sup>1)</sup>

β. fere autem ~~xxxxxx~~ convenit et uni recte solvi et unum iudicium<sup>2)</sup> petentem totam rem in litem deducere, item unius acceptilatione peremi utrisque<sup>3)</sup> obligationem :

γ. <sup>4)</sup> ex quibus colligitur<sup>ur</sup> unumquemque perinde sibi adquisisse ac si solus stipulatus esset, excepto eo quod etiam facto eius cum quo commune ius stipulantis, ~~xxx~~ amittere debitorem potest.

δ. secundum quae si unus ab <sup>4a)</sup> aliquo stipuletur, novatione quoque <sup>habetur</sup> [liberare eum ab altero cum id specialiter agit]<sup>5)</sup>, eo magis cum eam stipulationem similem esse solutioni ~~xxxxxxx~~ existimemus:

ε. alioquin quid dicemus, si unus delegaverit creditori suo communem debitorem isque ab eo stipulatus fuerit? aut <sup>6)</sup> [fundum] iusserit doti [promittere]<sup>7)</sup> viro, vel nuptura ipsi doti eum<sup>8)</sup> [promiserit]<sup>9)</sup>

ζ. [nam debitor ab utroque liberabitur.]

1) I must ~~xxxxxxx~~ maintain the genuineness of the clause 'et quid ...adquisierit' as against Beseler, II. p. 56, whom Levy, Konk., p. 380 follows.

2) iudicio; Lenel, Pal., II. col. 1220.

3) utriusque: Beseler, l.c.

4) I must maintain the genuineness of period γ. as against Beseler, l.c.

5) (from γ) debitor ab utroque liberabitur.

6) read 'eundem' (sc. communem debitorem); so Huschke, Lindes Zeit schr., new series, II. p. 153 f.; ~~Binder~~ Binder, p. 216 n, l.c.

7) dicere

8) read 'eidem' (sc. communi debitori); Huschke: 'debitum.'

9) ~~xxx~~ dixerit.

4a) read 'alio quo',  
Baron, Seramtred.  
philosophie, p 320;  
ada, p 216 n. 19

The special question raised in this paragraph, namely, whether one correal creditor has the power of excluding the other by means of a novation, must be reserved for a monograph on Novation. As regards periods  $\delta$  and  $\epsilon$ , the compilers<sup>1)</sup> have transferred the words 'debitor ab utroque liberabitur' to the end of the paragraph, and substituted a <sup>clause</sup> passage of their own. In the conclusion of  $\epsilon$ , a reference to dotis promissio has evidently been substituted for a reference to dotis dictio, and apparently as a result of this substitution the remaining text has become somewhat corrupted.

In the present work however we are concerned solely with the general observations in periods  $\beta$  and  $\gamma$ . Period  $\beta$  affords a striking confirmation<sup>1)</sup> of our thesis as to the comparatively late development of active correality. A jurist writing about the age of Antoninus Pius can only say 'fere convenit' that solutio, litiscontestatio and acceptilatio have extensive consuming effect. Does not this tend to prove that even in the mature classical period there existed a school of jurists who denied the possibility of active correality, holding that an active joint stipulation, even if framed distributively, could only produce partition?

Period  $\gamma$  is important<sup>nt</sup> as giving an exposition of the precise relation of active correal creditors. Each of the latter occupies the position of a sole creditor, except that he is liable to be ~~be~~ deprived of his obligatory right by the act of his co-creditor. Here it is the substantial independence of the two obligations, rather than their formal unity, that receives emphasis. quasi socia obligationis' may be compared, *see* *Paul. D. (44.3) 14.*

1) *vide* *supra* p 22 § 114; 132.



- (5) ~~47~~ D. (46.4)13.12. Ulpian. L ad Sabin.  
 α. Ex pluribus <sup>reis</sup> ~~xxx~~ stipulandi si unus acceptum fecerit,  
 liberatio contingit in solidum.  
 D.eod. 16 pr. Idem VII disput.  
 β. Si ex pluribus obligatis uni accepto feratur, non ipse ~~xxx~~  
 solus liberatur, sed ~~x~~ et his qui secum obligantur:  
 γ. nam cum ex duobus pluribusque eiusdem obligationis  
<sup>iii</sup> participibus uni accepto feratur, ceteri quoque liberantur,  
 δ. non quoniam ipsis accepto latum est, sed quoniam velut  
 solvisse videtur is, qui acceptilatione solutus est.

A full discussion of the bearing of acceptilatio on the correal relation must be reserved for a special treatise on Acceptilatio, and it is not proposed to do more here than to quote the above passages as stating acceptilatio-consumption. In the passive case, it will be observed, Ulpian gives acceptilatio an extensive consuming effect on ~~the~~ the express ground that it is deemed formally equivalent to solutio. This might be accurate enough for the practical purposes of the classical law, but it cannot be described as historically sound. Almost certainly acceptilatio preceded solutio as a means of discharging obligations ex stipulatu without action.

*It will be observed*

~~As regards fr. 16 pr. it should be noted~~

that periods β. and γ. are tautological, and on that account <sup>fr 16</sup> the ~~xxxxxx~~ pr. can hardly be attributed to Ulpian in its present form; probably the compilers have deleted something after β. . With the words 'eiusdem obligationis participibus', Julian. D. (46.3)34.6. 'particeps et quasi socia obligationis' may be compared; ~~also Paul D. (46.8) 14.~~

- (6) 187 D. (46.1)5 Ulpian. XLVI ad Sabin. with confusio and has x
- α. Generaliter Iulianus ait eum qui heres exstitit ei pro quo intervenerat, liberari ex causa accessionis et solummodo quasi heredem rei teneri. ~~Et~~ denique scripsit, si fideiussor heres exstiterit ei pro quo fideiussit, quasi reum esse obligatum, ex causa fideiussionis liberari: reum vero reo succedentem ex duabus causis esse obligatum<sup>1)</sup>

β. <+><sup>2)</sup> In the first place, if we ignore the difficulty caused by

γ. [nec enim...duas obligationes sustinet.] the imperfect subjunctives 'esset' and 'haberet', and give both the latter the force of present tenses, then

δ. item si reus ~~stipulandi~~ stipulandi exstiterit heres rei stipulandi duas species obligationis sustinebit: plane si ex altera earum egerit, <-><sup>3)</sup> utramque consumet.

ε. [videlicet quia natura obligationum duarum quas haberet ea esset ut cum altera earum in iudicium deduceretur, altera consumeretur.]

time of the original constitution of the obligations -

the nature of the two obligations when they were originally

constituted was such that... This interpretation gets over

1) ~~(from ε.)~~ sed si ex altera conventus fuerit, <sup>e</sup> ex altera

conveniri non posse, // quia natura obligationum duarum

2) (from ε) cum initio in diversis reis constitissent ea esset ut cum altera earum in iudicium deduceretur, altera consumeretur.

3) eadem ratione

There is undoubtedly a close connection between this fragment and D. (19.1)10; see Levy, Konk., p. 455 ff., with whose views however I cannot altogether agree; cf. supra p. 120 n. 1. In my opinion periodically is insignificant; how far it consists of classical elements taken from another context cannot be discussed here; D. (45.2)15 contains part of this period in a somewhat debased form.

4) 'deduceretur' and 'consumeretur' of course depend on 'esset'.



This fragment deals with confusio and has ~~the~~ the same basis as Venul<sup>6</sup>rius D.(45.2)13~~4~~; here we can only ~~discuss~~ deal with it in so far as it bears on the subject of process-consumption.<sup>1)</sup>

In my opinion the final period has been transposed from its original position, namely  $\beta$ , where it referred to the passive, not to the active, relation. In the first place, if we ignore the difficulty caused by the imperfect subjunctives 'esset' and 'haberet', and give both the latter the force of present tenses, then taking  $\delta$  and  $\epsilon$  together we have the following glaring petitio principii: if the creditor sues on one of the two obligations, he consumes both, because their nature is that an action on the one consumes the other! But in the second place, how are the two imperfect subjunctives to be justified? It may be said that 'esset' refers to the time of the original constitution of the obligations;—the nature of the two obligations when they were originally constituted was such that... This interpretation gets over the petitio principii, but it is hardly possible on grammatical grounds; moreover, if such was Ulpian's meaning, why did he not express the same clearly? In any event, however, 'haberet' seems impossible, the reference

1) There is undoubtedly a close connection between this fragment and D.(19.1)10; see Levy, Konk., p.455 ff., with whose views however I cannot altogether agree; cp supra p.120 n.1. In my opinion period  $\gamma$  is insiticious; how far it consists of classical elements taken from another context cannot be discussed here; D.(45.2)13 contains part of this period in a somewhat debased form.

2) 'deduceretur' and 'consumeretur' of course depend on 'esset'.

The classical jurists prefer 'scilicet'; Heumann-Seckel, p. 623 s.v. videlicet.

3) see as to this fragment Levy, Konk., p. 453 ff.

being to the present time. In the third place we note the inelegant change from ~~Id~~ 'duae (duas) species obligationis' in  $\delta$ . to 'duae obligationes ~~duarum~~ (obligationum duarum)' in  $\epsilon$ . In the fourth place 'videlicet' is a favourite word of the compilers, being frequently employed by them to tack on one passage to another.<sup>1)</sup>

All difficulty disappears if my restoration of period  $\beta$ . is adopted. The tenses are accounted for by the oratio obliqua, and the passage makes excellent sense. The two obligations, as originally constituted <sup>between</sup> between ~~T.~~ (let us say) T. and M. and <sup>^</sup> T. and S. were correally related, and they remain correally related ~~thru~~ though by devolution they become united in the person of a single debtor. With our present fragment, as so ~~restored~~ restored, we may compare Julian. D. (44.7)<sup>2)</sup> 18, where the facts are as follows: M. is entitled to slave Stichus ex stipulatu, and S. is entitled to the same slave ex testamento, so that their rights are plainly cumulative; though M. succeeds as heir to S. (or vice versa) the same cumulative relation subsists, litiscontestatio under the one obligation having no effect on the other. The motive is as follows: quia initio ita constiterint hae duae obligationes ut altera in iudicium deducta altera ~~nix~~ nihilominus integra remaneret.

If my restoration be sound, the compilers have ~~xxx~~ followed their not infrequent course of cutting out a passage from the middle of a text and transferring it, amended as required, to the end thereof. Their reason

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<sup>1)</sup> The classical jurists prefer 'scilicet'; Heumann-Seckel, p. 623 s. v. videlicet.

<sup>2)</sup> see as to this fragment Levy, Konk., p. 453 ff.



for here adopting this course is plain. In their time ~~process-consumption~~ extensive process-consumption had been abolished in the passive case, but was maintained, to outward appearance at least, in the active case; hence they transferred Julian's motive (quia...) from the former case to the latter, and in so doing substituted the impossible 'quasi liber' for 'cum in initio in diversis rebus'.

Our present fragment, as restored and considered in conjunction with Julian D. (44.7)18 (cit.) is important as showing how Julian considered the correal relation. The two obligations are recognised as distinct, only they ~~are~~ stand related in a particular way, - they have in their relation to one another a particular 'natura', that is to say, litiscontestation under the one consumes the other. It does not of course follow that Julian rejected the idea of unity of obligation; in D. (46.3)34.1, he speaks of an 'obligatio communis', and the recognition of the diversity of obligation in connection the present may be attributed to the nature of the subject matter dealt with, viz., confusio. The inference is however plain that to his mind the unity of obligation was simply a piece of juridical construction, - that 'eadem (una) obligatio' meant nothing more than 'duae obligationes quarum natura est ut cum altera earum in iudicium deducatur altera consumatur'. Again, nothing is said of solutio-consumption; it is on process-consumption that the correal relation essentially depends.

For further details consult the following: Savigny, *Lehrbuch des Pandektenrechts*, IV. p. 33 ff.; Brinz, *Lehrbuch des Pandektenrechts*, IV. p. 33 ff.; Vangerow, *Pandektenrecht*, III. p. 33 ff. (1873); Mittels, *Individualien*, I. p. 33 ff.; Reicher, *u. Volker*, p. 153; Binder, p. 301 ff.; Bortolucci, *Storia del Diritto*, I. p. 309 ff.; Collinet, *Etudes Hist. sur le Dirit de Justinien*, I. p. 133 ff.

vide infra p. 228 ff

7  
(4)

D. (45.2) 11 pr. Papinian. XI respons.

α. Reos promittendi vice mutua fideiussores non inutiliter accipi convenit:

β. <-><sup>1)</sup>

γ. reus [itaque]<sup>2)</sup> stipulandi actionem suam dividere si velit (neque enim dividere cogendus est) poterit eundem ut principalem reum, item qui fideiussor pro altero exstitit, in partes convenire, non secus ac si duos promittendi reos divisim actionibus conveniret.

This is one of the texts of the Digest which merit the title of 'famous', and if one were to attempt to discuss at length all the various opinions which have been expressed regarding it, a separate volume would almost be required.<sup>4)</sup>

1) nam si alter ut is qui fideiussor pro altero exstitit condemnatus erit, alterum qui a reo stipulandi liberatus est mandati actione obligatum habebit; itaque si iudicatum non faciat, hanc ~~actionem~~ actionem cedere reo stipulandi per praetorem compelletur, vel actio utilis dabitur

2) autem  
3) read 'et ut eum' ?; Savigny, Obligationenr., I. p. 268 n(a) suggests item tamquam eum.

4) The curious reader may consult the following: Savigny, Obligationenr., I. p. 268 ff.; Brinz, Krit. Elätt., IV. p. 36 ff.; Vangerow, Pand., III. p. 83 ff. (§ 573); Mitteis, Individualisierung d. Obligat., p. 69 ff.; Reichsr. u. Volksr. p. 183; Binder, p. 301 ff.; Bortolucci, BIDR., 17. p. 309 ff.; Collinet, Etudes Hist. sur le Droit de Justinien, I. p. 131 ff.

being condemned in the name of S., has an actio mandati against the latter; if K. satisfies the judgment, good and well; if he does not, the praetor can put pressure on him to assign his actio mandati to T., who can then sue S. for the unrecovered balance; or again, if K.

vide infra p. 325

2) The circumstances of the mutua fideiussio clearly imply that each has given the other a mandate to become fideiussor for him.



To begin with, nothing will persuade me that Papinian was here dealing with any case other than that where ~~the~~ two parties were first taken bound as principal correal debtors and then as fideiussors for one another, thus:

T.: Maevi, decem dari spondes?

Sei, eadem decem dari spondes?

M.: spondeo

S.: spondeo

T.: Maevi, eadem decem pro Seio fide tua esse iubes?

M.: fide mea esse iubeo

T.: Sei, eadem decem ~~decem~~ pro Maevio fide tua esse iubes?

S.: fide mea esse iubeo.

Any suggestion that we have here to do with <sup>the</sup> Greek institute of ἀλληλεγγύη, or that there is any connection between Papinian's vice mutua fideiussores and the ἀλλήλων ὑπεύθυνοι of Novel 99,<sup>1)</sup> must in my opinion be absolutely rejected.

Now in Δ. Papinian says 'it is agreed that the taking of correal debtors bound as mutual fideiussors is ~~not~~ not without its utility'. Wherein consisted the utility of this practice? So far as I can see, the one answer is reasonably possible, namely, that the creditor thereby escaped the perils of extensive process-consumption. How this was accomplished is easy to understand. The creditor T. sues one of the co-debtors, say M., not as principal but as surety for the other S.; M. being condemned in the name of S., has an actio mandati against the latter;<sup>2)</sup> if M. satisfies the judgment, good and well; if he does not, the praetor can put pressure on him to assign his actio mandati to T., who can then sue S. for the unrecovered balance; or again, if M.

<sup>1)</sup> vide infra p. 325 //

<sup>2)</sup> The circumstances of the mutua fideiussio clearly imply that each has given the other a mandate to become fideiussor for him.

xxxxxx' duos! premi obediunt' xixxxxxxfixxxdemonstrating correality, but

1) There is a striking similarity between the language of Papiian. D(46.1) 51. 2 and that of our present period.



'duos' is a technical prefix connoting ~~the~~ correality, ~~and xxxxxxxx but~~ but 'duos promittendi reos', and it may be that he chose this latter sequence deliberately to avoid the possibility of 'duos' being construed as a technical prefix.

On the other hand however it seems impossible that the compilers have preserved the whole of Papinian's argument. Period  $\gamma$  purports to be a deduction from  $\alpha$ ~~xx~~; the special advantage which the creditor obtains by the mutua fideiussio appears to be that he can divide his action by suing one of the co-debtors partly as principal, and partly as fideiussor for the other. But if the fore<sup>going</sup> ~~going~~ ~~xxx~~ ~~exposition~~ exposition be sound, the creditor's power of dividing his action is a matter of small significance; the substantial benefit which he obtains by the mutua fideiussio is a power of suing either co-debtor ~~for~~ for the whole as surety for the other. Hence I am driven to the conclusion that in Papinian's original text, period  $\gamma$  did not follow immediately on  $\alpha$ . This view is slightly supported by two considerations:

(a) 'itaque' standing second in its clause, though by no means impossible in <sup>classical</sup> legal Latin, is somewhat suspicious;

moreover if period  $\gamma$  followed ~~xxx~~ immediately on  $\alpha$ , an explanatory particle such as 'nam' would <sup>have</sup> been more appropriate;

(b) in  $\alpha$  the verb 'convenire' is used in the sense of 'to be agreed', while in  $\gamma$  it is used (bis) in the sense of 'to sue'; but it is hardly likely that Papinian would employ the same verb in two different senses in such close proximity.

Accordingly I have ventured to insert a period  $\beta$ , and

<sup>1)</sup> Beseler, III. p.105 ff.

to substitute 'autem' for ~~xxx~~ 'itaque' in  $\beta$ . . If Papinian wrote such a passage as  $\beta$  , the compilers would naturally delete the same owing to the reference to process-consumption; under the Justinian law, the creditor was able to sue both correal creditors one after the other, so that the substantial benefit formerly arising from mutua fideiussio was now afforded in ~~any~~ every case. Moreover with the deletion of  $\beta$  ., the 'autem' (as we suppose) introduced introducing  $\beta$  . lost its force, and it was quite natural that the compilers should substitute another particle; perhaps they took the 'itaque' from the concluding sentence of  $\beta$  .

But now a further point arises; why should the creditor wish to divide his action when it was more to his advantage to sue one of the co-debtors for the whole as surety for the other? If T. sued M. for VI as principal and for IV as fideiussor on S's behalf, ~~xxxx~~ as regards the VI he loses all faculty of regress against S. should M. fail to pay. It may be suggested that Papinian was here dealing with a point of more or less academic interest, but such an explanation is hardly satisfactory. Perhaps there may be something in Mitteis's<sup>1)</sup> suggestion ~~that~~ that in the concrete case submitted for decision T was endeavouring to evade the exceptio litis dividuae.<sup>2)</sup> Suppose T. and M. are resident ~~xxxxxx~~ in the same place, but S. is resident elsewhere; T. at present only wishes to exact VI of the X due, and he therefore sues M., whose solvency is beyond doubt, for this sum as principal

<sup>1)</sup> Individualisierung , p. 69 ff.; Reichsr. u. Volksr. p. 183 f contra Binder, p. 101 ff.; Collinet, Etudes Hist. sur le Droit de Just. p. 131 ff.

<sup>2)</sup> Eni. IV. 122



debtor; subsequently, but intra eiusdem praeturae, he wishes to sue for the remaining IV; the exceptio litis dividuae does not prevent him from ~~suing~~ suing S., but this course is inconvenient, S. being resident in another place; but if he sues M. as fideiussor for S., does the exception lie? No, because when T. sues M. pro parte as principal as principal debtor and pro parte as fideiussor for S., the position is the same as if he were to sue M. and S. each in a separate pro parte action. This explanation may be accepted until something better is suggested.

the common creditor may bring a separate pro rata action against each correal debtor, each correal creditor may bring a separate pro rata action against the common debtor. But we ask, can the common creditor bring a single joint action in solidum against the various correal debtors together, can the various correal creditors together bring a single joint action in solidum against the common debtor? There seems little doubt that such a course is possible; here we seem to have the causa coniuncta mentioned by Quintilian, Inst. Or. 3:10.8; *una a duobus iurata eandem rem atque ex eadem causa petit, aut duo ab uno, aut plures a pluribus.*

The case of a single joint action in solidum raises several questions:

(a) Suppose in the passive case that the common creditor, T., makes a 'simple joint' litiscontestatio with the correal debtors, M. and S., so that the formula runs: *si paret Maevium et Seium Titio decem dare oportere iudex, Maevium et Seium Titio decem condemnato* etc. Such a formula can only result in a 'simple joint' condemnation against M. and S. But can T., having obtained such a condemnation, proceed to execute the same

// see Levy, *Konk.*, p. 197<sup>5</sup>, n. 87. / 197.

We conclude our study of correal<sup>ly</sup> ex stipulatu under the classical law with a brief note regarding the mode of suing on a correal obligation. No attempt can ~~however~~ be made to deal ~~with~~ exhaustively with the subject ~~which~~, as the rules here to be applied depend on technicalities of the formulary system which have evoked considerable controversy.

Certainly the common creditor may sue any one correal debtor alone, any one correal creditor ~~may~~ alone may sue the common debtor, in solidum. Like wise the common ~~a~~ creditor may bring a separate pro rata action against each correal debtor, each correal creditor may bring a separate pro rata action against the common debtor. But we ask, can the common creditor bring a single joint action in solidum against the various correal debtors together, can the various correal creditors ~~bring~~ together bring a single joint action in solidum against the common debtor? There seems little doubt that such a course is possible<sup>1)</sup>; here we seem to have the causa coniuncta, mentioned by Quintilian, Inst. Or. 3.10.2<sup>5</sup> in unus a duobus dumtaxat eandem rem atque ex ~~e~~ eadem causa petet, aut duo ab uno, aut plures a pluribus.

The case of a single joint action in solidum ~~raises~~ several ~~questions~~ questions:

(a) Suppose in the passive case that the common creditor, T., makes a 'simple joint' litiscontestatio with the correal debtors, M. and S., <sup>and</sup> ~~so that~~ the formula runs: si paret Maevium et Seium Titio decem dare oportere, iudex, Maevium et Seium Titio decem condemnato etc. Such a formula can only result in a 'simple joint' condemnation against M<sup>a</sup> and S. But can T., having obtained such a condemnation, proceed to execute the same

<sup>1)</sup> see Levy, Konk., p. 197<sup>8</sup>, n.6 <sup>1</sup> 197.



against either M. or S. in solidum, or must he split up his judgment claim and proceed against each for V only? The late classical jurists<sup>1)</sup> decided in favour of the second alternative.<sup>2)</sup> Paul. IV respons.

D. (49.1)10.3 Ulpian VIII disput.  
Quotiens autem plures in unam summam condemnantur, post utrum una sententia est [et quasi plures in unam summam rei sint promittendi]<sup>2)</sup>, ut unusquisque eorum in solidum teneatur, an vero scinditur in personas sententia, quaeritur. et Papinianus respondit, scindi sententiam in personas atque ideo eos qui condemnati quotiens a tutoribus singulis procuratoribus datis sunt viriles partes debere.

Apparently in Ulpian's view, if the joint sententia is construed as a single undivided whole, the result necessarily is that that such sententia can be executed in solidum against any one of the parties condemned; if it can only be executed against each ~~pro~~ pro rata, we must consider it merely as the sum of a number of particular sententiae. This view is entirely sound; a passive joint condemnation, like a passive joint contract, obligation, in other words was a correal joint condemnation, naturally leads to correality, not partition. Papinian's decision in favour of partition of the judgment is ~~never~~ referred to in the following text: accepted; just as a passive simple joint stipulation leads to partition, not correality, so with a passive simple joint condemnation.

D. (42.1)43 Paul. XVI respons.

Paulus respondit eos qui una sententia in unam

<sup>1)</sup> From the fact that the question is not mentioned in earlier writings we may perhaps infer that joint actions only came into use at a comparatively late date.

<sup>2)</sup> apparently a gloss. fragment is apparently a gloss; so Gradenwitz, *loc. cit.*, 7. p. 55.

quantitatem condemnati sunt, pro portione virili ex causa iudicati conveniri, ...~~et~~...<sup>1)</sup>

D. (17.1) 59.3<sup>2)</sup>

Paul. IV respons.

~~Paul~~ Paulus respondit unum ex mandatoribus in solidum eligi posse, etiamsi non sit concessum in mandato: post condemnationem autem in duorum personam collatam necessario ex causa iudicati singulos pro parte dimidia <sup>u</sup> conveniri <sup>e</sup> posse <sup>r</sup> et debere.

C. (7.55) 2

Imp. Gordian. (a. 242)

Quotiens a tutoribus singulis procuratoribus datis insequitur in ~~omnium~~ omnium persona condemnatio, periculum sententiae <sup>e</sup> videri esse diximus. ~~I~~ ideoque quod ab uno servari non potuerit, a ceteris exigi non posse explorati iuris <sup>r</sup> est.

(b) But, we ask, could a passive joint <sup>s</sup> condemnation ever be made in distributive form so as to render the defendants liable ~~singuli~~ singuli in solidum in the judgment obligation, in other words was a correal joint condemnation ever competent? Such a condemnatio seems clearly referred to in the following text:

D. (49.14) 39.1 Papinian. XVI respons.

Eum qui periculum communis condemnationis dividi postulavit, quod participes iudicati solvendo essent revocatis alienationibus <sup>o</sup> quas fraudulenter fecerant, non ~~et~~ videri causam pecuniae fisco nuntiasse respondi.

The demand for a beneficium divisionis here mentioned necessarily implies the existence of a <sup>solidary</sup> correal relation.

<sup>1)</sup> The remainder of this fragment is apparently a gloss; so Gradenwitz, ZSS., 7. p. 65.

<sup>2)</sup> *vide infra* p. 318.



Compare also

C. (7.55)1. Imp. Alexander (a.229)

Si non singuli in solidum, sed generaliter tu et collega tuus una et certa quantitate condemnati estis, nec additum ut quod ab altero servari non possit, alter suppleret, effectus sententiae virilibus <sup>r</sup>portionibus discretus<sup>est</sup>, ideoque parens pro tua portione sententiae ob cessationem alterius ex causa iudicati conveniri non potes.

But under what circumstances was a correal joint condemnation competent? In the case of a stricti iuris iudicium such a condemnation necessarily implies a correal joint litiscontestatio and a correal joint formula: si paret Maevium et Seium singulos in solidum Titio decem dare ~~esse~~ oportere, iudex, Maevium et ~~Seium~~ Seium singulos in solidum Titio decem condemnato etc. The question in what cases it was competent for the praetor to admit a correal joint litiscontestatio and grant a correal joint formula ~~is~~ cannot be discussed here. Nor can we consider whether in a bonae fidei iudicium the iudex could ever pronounce a correal joint condemnation, where the litiscontestatio and formula were simple joint merely.

(c) As regards the active case a simple joint condemnation will plainly infer pro rata judgement rights merely, and we can hardly suppose a condemnation was ever framed so as to confer correal judgment rights.

Finally there was no reason why the common creditor should not sue the various correal debtors each pro rata together and conversely in the active case. Here however separate pro rata litiscontestat-  
~~ions and formulae would appear to be necessary, though~~  
<sup>and formulae</sup> ~~iones~~ would appear to necessary, though all these formulae would be sent to the same iudex and the different processes disposed of together.

Whether correality could be produced by nexum is a question of purely antiquarian interest, which we must leave to those who have made a special study of this contract.

The opinion frequently expressed that correality could not be created by litteral contract is altogether without <sup>support</sup> authority. Certainly there was no technical objection to a manipulation of ledger entries for the purpose of creating an active or a passive correal relation, and that such manipulations were actually resorted to, particularly in the case of banking transactions, is highly probable.

Levy <sup>1)</sup> quotes two passages which seem to contain a reference to an active correal obligation created in favour of bankers.

~~xx~~ D. (2.14)9. pr. Paul. LX ad edict.

Si ~~plures~~ plures sint qui eandem actionem habent, unus loco habentur, ut puta plures sunt rei stipulandi vel plures argentarii quorum nomina simul facta sunt: unus loco numerantur quia unum debitum est.....

D. (4.8)34 pr. Paul. XIII ad edict.

Si duo rei sunt [aut] credendi [aut debendi] et unus compromiserit isque vetitus sit petere [aut ne ab eo petatur] ~~et~~ videndum est an, si alius petat, [vel ab alio petatur] poena committatur: idem in duobus argentariis quorum nomina simul eunt.....

~~Correality~~ Correality ex testamento is free from all difficulty. In the passive case if a legacy is granted thus: 'Titius et Maevius heredes mei decem Seio danto,'

<sup>1)</sup> Levy, Konk., p. 382 ff.

<sup>1)</sup> l.c.



Si its scriptum sit: 'Lucius Titius ~~x~~ heres meus aut  
Maevius heres ~~maev~~ meus decem ~~dato~~ Seio<sup>o</sup> dato<sup>o</sup>', cum  
utro velit Seius aget, ut si cum uno actum sit ~~xxakterx~~  
~~xxakterx~~ [et solutum],<sup>2)</sup> alter liberetur, quasi duo rei  
promittendi in solidum obligati fuissent. [quid ergo  
si ab altero partem petierit? liberum cui<sup>3)</sup> erit ab  
alterutro reliquum petere. idem erit et si alter  
partem solvisset.]<sup>4)</sup>

Doubtless however any other distributive form of bequest would equally suffice for the creation of correality, for example, 'Titius heres meus decem, Maevius heres meus eadem decem, Seio dato (or danto).'

As regards the active case a legacy granted thus: heres meus decem Titio et Maevio dato', will render T. and M. entitled merely pro rata. Correality can however always be created by the use of a distributive form:

Si Titio aut Seio, ~~xxxixix~~ utri heres vellet, legatum relictum est, heres alteri dando ab utroque liberatur.

i) *An alternative of interrogating*  
~~This mode~~ could not be used in the case of a stipulation  
 by a common slave; D.(45.3)9.1; 10;21.

2) I agree with Levy, Konk., p.194 n.3 that beyond the deletion of these words no further restoration is here required; Krüger, Dig., following Donellus, deletes 'cum utro...solutum'.

3) v.l. ei; Mommsen: utique.

4) I regard this passage as a gloss.

si neutri dat, uterque perinde p̄tere potest atque si ipsi soli legatum foret: nam ut stipulando duo rei constitui possunt, ita et testamento potest id ~~fieri~~ fieri.

The most novel feature of the present work is the theory of simple or non-correal solidarity which it sets forth. Simple solidarity, as here conceived, is merely an improper species of correality admitted by the classical jurisprudence where a joint contract was incapable of producing correality proper on account of some material 'inequality' or 'non-identification'.

This institute of simple solidarity I believe to have taken its rise within the sphere of real and consensual contracts. As we have seen, any formal inequality or non-identification in a correal stipulation rendered the act entirely void, and probably under the old civil law material inequality or non-identification had the same effect. On the other hand in the case of a joint real or consensual contract there can be no such thing as formal inequality or non-identification, and to hold such a contract void on the ground of material inequality or non-identification would, as we shall explain later, have been highly inconvenient. Hence to meet this latter case I conjecture that jurisprudence invented a new solidarity relation based, not on process-consumption, but on solution-consumption, and that eventually this new institute gained a footing within the realm of obligations ex stipulatu. When all the constitutive requisites of a correal stipulation were fulfilled, but correality was excluded by reason of some material inequality or non-identification, the jurists of the mature classical period or even earlier, instead of pronouncing the act null and void, treated it as productive of a simple solidarity relation.



follows:

} <sup>2</sup>/<sub>27</sub> Principles of Simple Solidarity.

(1) There is no distinction between the two

The most novel feature of the present work is the theory of simple or non-correal solidarity which it sets forth. Simple solidarity, as here conceived, is merely an improper <sup>he</sup> species ~~in~~ of correality admitted by the classical jurisprudence where a joint contract was incapable of producing correality proper on account of some material 'inequality' or 'non-identification'.

(iv) In This institute of simple solidarity I believe to have taken its rise within the sphere of real and consensual contracts. As we have seen, any formal inequality or non-identification in a correal stipulation rendered the act entirely void, and probably under the old civil law material inequality or non-identification had the same effect. On the other hand in the case of a joint real or consensual contract there can be no such thing as formal inequality or non-identification, and to hold such a contract void on the ground of material inequality or non-identification would, as we shall explain later,<sup>1)</sup> have been highly inconvenient. Hence to meet this latter case I conjecture that jurisprudence invented a new solidary relation based, not on process-consumption, but on solutio-consumption, and that eventually this new institute gained a footing within the realm of obligations ex stipulatu. When all the constitutive requisites of a correal stipulation were fulfilled, but correality was excluded by reason of some material inequality or non-identification, the jurists of the mature classical period or even earlier, instead of pronouncing the act null and void, treated it as productive of a simple solidary relation.

1) *infra* p. 243 f.

The cardinal principles of simple solidarity are as follows:

- (i) There is no constructive identification of the two obligations, - no 'eadem res'; Papinian we believe states the position by the words 'in cuiusque persona propria singulorum consistit obligatio'.<sup>1)</sup>
- (ii) As there is no 'eadem res', litiscontestatio has no extensive consuming effect.
- (iii) As there is no 'eadem res' there can be no extensive responsibility.
- (iv) In spite of the absence of 'eadem res' solutio has, at law and not merely in equity, extensive consuming effect.<sup>2)</sup>

Simple solidarity, as well as correality, thus stands opposed to cumulation, but in a different sense. According to the old civil law, correality and cumulation exhausted the whole field of possible relations. If litiscontestatio had extensive consuming effect, the result was correality; if it had not, the result was cumulation. Under the classical jurisprudence, on the other hand, we have a new relation which stands opposed to cumulation because of the extensive consuming effect of solutio, not of litiscontestatio. When, applying the principles of the old civil law, ~~namque~~ we say that a correal stipulation cannot result in cumulation, we mean that it cannot produce obligations which do not stand to one another in a process-consumption relation; if it be incapable of producing ~~obligations~~ obligations so related,

~~1) infra p. 276~~ <sup>1)</sup> ~~infra p. 276~~ <sup>2)</sup> ~~infra p. 276~~

<sup>2)</sup> Whether acceptilatio had an extensive consuming effect as between simple solidary obligations is altogether doubtful. On the one hand if we attach predominating importance to its property as a formal receipt of payment, we must accord it the same consumptive force as payment itself. On the other hand if we take into account the fact that in classical times, acceptilatio was normally employed as a means of discharging obligations without payment, then we may deny it extensive consuming effect. The probabilities are however, I think, in favour of the first view.

we omit reference to the case where it produces a valid simplex obligation.



it is null and void.<sup>1)</sup> But on an application of the principles of the classical jurisprudence, the statement that a correal stipulation cannot result in cumulation means that the obligations which it produces must at any rate stand in a solutio-consumption relation, whether or not they also stand in a process-consumption relation.

The antithesis simple solidarity v. partition requires a word of remark. If we adhere strictly to the principle that partition implies an ideal correal obligation ~~to be divided~~,<sup>2)</sup> we must, where the possibility of two co-creditors or co-debtors being correally related is excluded, likewise exclude the possibility of ~~their~~ their being entitled or bound pro rata. Nevertheless in certain cases where the possibility of correalty is excluded merely through the 'individualised' nature of the prestation-object, but the latter is capable of division, it would be unreasonable to deny the possibility of partition as an alternative to simple solidarity ~~on the~~ on the technical ground aforesaid alone.

As in correalty, so also in simple solidarity the principle of 'subjective alternativity', which is the predominating element in all solidarity, must have free scope. The common creditor must have the power of 'electing' any one of his simple solidary debtors; any one simple solidary creditor ~~must~~ <sup>must</sup> have the power of 'occupying'; any element which impedes the free exercise of these powers is anti-solidary.

But further, we must, I believe, regard 'substantial equality of prestation' as another indispensable element in the classical simple solidarity. Thus we ~~cannot~~ cannot conceive of an obligation ~~ex~~ dari and an obligation

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<sup>1)</sup> we omit reference to the case where it produces a valid simplex obligation.

<sup>2)</sup> *vide supra* p. 30.

fieri standing in a simple solidary relation. Moreover I do not think we can ever have simple solidarity without equality of prestation-object, though this requirement has a different significance here than in the case of correality. In a correality the equality must be in toto, that is to say, the one full prestation-object must be equal to the ~~full~~ other full prestation-object. Thus consider two obligations (a) decem dari and (b) sex dari. For purposes of correality it is not permissible to analyse obligation (a) into two obligations (c) sex dari + (d) quattuor dari, and then to say that obligations (c) and (b) may be correally related and obligation (d) left outstanding. Taken each as a whole obligations (a) and (b) are unequal, and for purposes of correality no pro tanto equality between them can be recognised.<sup>1)</sup> On the other hand for purposes of simple solidarity the aforesaid analysis seems to be legitimate. A simple solidary relation may exist between obligations (c) and (b), with obligation left outstanding. Likewise if we have two obligations (a) decem et Stichum dari and (b) decem dari, it seems permissible to analyse obligation (a) into two obligations (c) decem dari and (d) Stichum dari, and to proceed in the same way as before.

The crucial case, however, is that where obligation (a) has a compound prestation-object in the alternative e.g. <sup>d</sup> Decem aut Stichum dari, and obligation (b) has a simple prestation-object consisting of one of the same alternative elements e.g. decem dari. Is it possible for these two obligations to stand in a simple solidary relation? Yes, we think, but only in one way, namely by interpreting obligation (a) as an obligation decem dari subject to the modality of an alternative prestation-object. This significance of this interpretation lies in ~~the fact that the modality is an alternative~~

1) cf. *supra* p 18, 94.



object. The significance of this interpretation lies in the fact that the modality 'aut Stichum' only affects obligation (a), and hence the giving of Stichus cannot at law ~~extinguish~~ extinguish obligation (b).

The whole matter may be summed up by saying that though in ~~simple~~ simple solidarity the classical jurisprudence had managed to dispense with the idea of unity of obligation, it was, we think, far from attaining the conception of pure subjective alternativity as a legal relation. Substantial equality of prestation was still required in order to establish a relation in ~~which~~ which solutio-consumption would at law operate extensively.

In our Introductory chapter <sup>1)</sup> we stated our adherence to the view that in simple solidarity there is a plurality of obligations directed to one and the same ~~end~~ juristic end;<sup>2)</sup> this view <sup>now</sup> requires examination. Stipulation is essentially an abstract negotium from which the element of juristic end, material, <sup>cause,</sup> economic interest, is formally eliminated. How then can the law take into consideration the identity of end of two obligations ex stipulatu, not constructively identified, so as to ~~take~~ place the latter in a simple solidarity relation? The answer is that the identity of end which we find in simple solidarity ex stipulatu is merely the reflex of an identity of originating cause. The exclusion of cumulation which unity of cause carries with it implies an unity of end even as between two purely abstract obligations; unity of juristic end here is merely the unity of originating cause ~~expressed~~ expressed materially and teleologically instead of formally and ontologically. Well, if this be so, we must conclude that simple solidarity, like correality, ex stipulatu is impossible without <sup>unity</sup> of cause. Whether this conclusion must be modified

1) *supra* p. 10.

2) unity of juristic end is an essential element in all solidarity, (*supra* p. 13), but in the case of solidarity <sup>correality</sup> it is merged in the larger unity of obligation.

so as to admit the establishment of simple solidarity ex diversis causis indirectly by means of reciprocal conditions will be considered in a later section,<sup>1)</sup> and a negative result arrived at. Solidarity without unity of cause can only be attained through the aid of equity.<sup>2)</sup>

This brings us to what we venture to lay down ~~with~~ with full confidence as a leading principle in this branch of the law, namely, that ~~in~~ <sup>(as between principal obligatus)</sup> anything in the nature of solidarity, without unity of <sup>(originating)</sup> cause was abhorrent to the civil law. Within the realm of obligations ex stipulatu this abhorrence is, I think, evidenced by the relation of principal debtor and independent guarantor by stipulation.

Suppose T. stipulates from M: decem dari spondes?, and that he subsequently stipulates from S.: ex eis decem quae Maevius mihi dare spondedit, quanto minus ab illo consecutus sim,<sup>3)</sup> dari spondes?, we call S. an independent or guarantor by stipulation on M's behalf. As a result of the second stipulation, S. becomes liable for the full X already promised by M., <sup>and to this extent we have a</sup> ~~so that undoubtedly there is~~ <sup>resemblance to solidarity,</sup> a certain solidary element in their relation. This case, as we shall see, was a source of considerable trouble to the jurists, the reason undoubtedly being that it did not fit in very easily with civil law principles. The result which Paul, and we may assume the late classical jurists generally, arrived at was to deny any liability on the part of S. until T. had been discussed and a deficiency in his resources disclosed. Accordingly T. was deprived of his power of election, <sup>and</sup> ~~and~~ <sup>being thus</sup> solidarity ~~was hence~~ excluded.

For the purposes of our present discussion,

1) or consequi possim, exigissem; see the passages quoted in  
— infra, p. 179 ff

1) infra p. 204. ff.

2) The result that ~~no~~ legal solidarity is impossible without unity of cause, comes with it the further result that partition is equally impossible without unity of cause. Partition implies an ideal solidary obligation, which is regularly ~~impossible~~ but may under exceptional circumstances be simple unity; vide infra p. 154.



nowever, we shall assume that T. has a power of election, and we ask, is the relation of M. and S. one of simple solidarity? The practical significance of this question lies in the fact that if M. and S. stand in a relation of simple solidarity, payment by S. frees M. and vice versa. There seems no doubt, however, that the question must be answered in the negative. The actual result which the late classical jurisprudence must certainly have arrived at is that on the one hand payment by S. leaves T.'s right against M. legally intact and so capable of assignment to S., and that on the other hand payment by M. does not free S. but renders his obligation non-existent (in whole or in part) ab initio.

of identifi Here we seem to see the reaction of the civil law against anything in the nature of solidarity without unity of cause. All difficulty would have been removed, had jurisprudence felt itself entitled to lay down that solutio by either the debtor or the guarantor freed the other. The exclusion of solidarity may indeed be explained in another way as follows: Formally S. does not promise X, but an uncertain sum not exceeding X; hence we have an inequality of prestation-object which is inconsistent with a solidary relation. But this inequality of prestation-object is immediately connected with the diversity of cause. Had S. formally promised the same X as M., the result would inevitable have been novation; only by making S.'s promise formally unequal to that of M. is an independent guarantee by stipulation possible at all.

result The same reaction of the civil law against anything in the nature of ~~xx~~ solidarity without unity of cause

Suppose the question to S. were ~~far~~ framed thus: ....  
quanto minus ille mihi solverit..., would the jurists stipul  
require T. to discuss M. before proceeding against S.?

also shows itself in the relations of principal debtor and mandator, constituens, argentarius recipiens. None of these relations, of course, belonged to the old civil law, but yet the principles of the latter made their influence everywhere felt. <sup>we</sup> shall see a still more striking example of the same reaction when we come to consider the case ~~of two independent mandators for the same principal debt.~~ <sup>directed to the same end.</sup>

Simple solidarity ex stipulatu, then, arises solely from a correal stipulation ~~which contains some element~~ where there is present some element rendering the two obligations materially unequal or, though equal, incapable of identification. <sup>A clear</sup> ~~The most obvious~~ example of such <sup>correally</sup> material inequality is where two parties stipulate/for, say, decem et (aut) Stichus, but Stichus happens to belong to one of them. <sup>A clear</sup> ~~The most obvious~~ example of the exclusion of identification between two equal obligations is where two parties promise ~~correally~~ <sup>correally</sup> services which are 'individualised' by the person of him who renders them. Examples of the <sup>exclusion of</sup> ~~same~~ identification <sup>between equal obligations</sup> in the active case are where two parties stipulate for the same usufruct or for the same sum dotis nomine, a usufruct or dos being individualised by the person of him to whom it is granted; <sup>here</sup> however partition will generally offer itself as a solution.

Here a valid In the following section ( § 24<sup>3</sup> ) we shall discuss the two fragments, Gaius D. (45.2)15 and Julian. eod. 5, where these ~~xxx~~ examples are given. No doubt our results depend entirely on conjectural restorations of the fragments quoted, but nevertheless they seem eminently reasonable and in accordance with the spirit of the classical jurisprudence. As we shall see later, <sup>2)</sup> the effect

But suppose no such break occurs, what is the

1) *infra* p. 309 ff., 312 f.

2) *infra* p. 227 ff.



160 § 2<sup>2</sup> ctd  
of the Justinianian reforms was to eliminate the classical distinction between correality and simple solidarity, which fact amply explains the scantiness of our authorities regarding this distinction.

The question may be asked whether parties had it in their power to reduce, by special agreement, a correal relation to one of simple solidarity? To this question a ~~decided~~ decided negative answer must be given. Provided the two prestations are materially equal and there is nothing in their nature to prevent their identification, correality is the civil law result, and any attempt to modify the stipulatory formula so as to exclude this result will nullify the whole act. Nor, in our opinion, can the effect of a correal stipulation be in any way modified by independent pacts; this point it will however be more convenient to discuss when we are dealing with solidarity from real and consensual contracts.<sup>1)</sup> A correal ~~relat~~ relation can only be reduced to one of simple solidarity, as it were through accidental circumstances which under the strict civil law would render the whole act null and void.

Finally, let us consider the form:<sup>2)</sup>

T. a Maeui, decem dari spondes?

M.: spondeo

T.: Sei, ~~eadem~~ eadem decem dari spondes?

S.; spondeo.

Here a valid obligation is in any event created between T. and M., but if any break in the continuity of act, as already explained,<sup>3)</sup> occurs between M.'s reply and the question to S., the latter's promise must, I believe, be pronounced void on the ground that 'eadem' is thereby ~~deprived~~ formally deprived of an antecedent, and the question to S. accordingly becomes meaningless

But suppose no such break occurs, what is the

<sup>1)</sup> *infra* p. 244 ff.

<sup>2)</sup> *cf.* the *enunciatio actus* from *infra* p. 67 n. 2.

<sup>3)</sup> *infra* p. 92 f.

net result of the act? In the first ~~place~~ place, does S.'s promise novate the already constituted obligation of M.? This, I believe, to be impossible. Diversity of cause is essential to novation, but here the stipulations from M. and S. form a continuous act, the two parts of which are connected by 'eadem' without any further express identification of the two prestations. If novation be intended the words 'quae Maevius dare spondit' or the like, must be inserted in the question to S., in which case the two stipulations, even though they follow the one immediately on the other, are shown to be formally distinct, and the latter has ~~thereof~~ <sup>no</sup> novatory effect. In the second place we ask, can the result be cumulation? Again a negative answer must be given; the term 'eadem' identifies the two sums of X as one and the same, and hence excludes ~~ex~~ ~~novation~~ a cumulative relation. In the third place we ask, can the result be simple solidarity? Again, we believe, the answer must be in the negative. Even though the proceedings form a continuous act, yet we have here two separate stipulations, not a single joint one, and hence simple solidarity, equally with correality, is excluded.

Under the ~~roman~~ civil law then I venture to think, S.'s promise must be pronounced incapable of producing any result and hence null and void. In my treatise on Accessoriality however I shall show grounds for believing that the jurisprudence of the Empire utilised this form for the purpose of taking bound a principal debtor and sponsor (or fidepromissor). <sup>if</sup>

The disposition of the remaining sections of this chapter is as follows:

In § 24<sup>3</sup>, as already stated, we shall examine the two fragments which bear <sup>directly</sup> on ~~simple~~ simple solidarity ex stip-

*cf. the corresponding action case mentioned supra p 67 n 2.*



183 § 27 Authorities (Simplex Mandatum)

ulatu.

D. 45 4 13. Gaius II de verb. obligat.

In § 27 we shall examine the authorities on the relation of principal debtor and independent guarantor by stipulation, and also the relations of principal debtor and

mandator, constituens and argentarius recipiens. Here

we shall see in practical operation the reaction of civil

law principles against anything in the nature of solidarity without unity of cause.

§§ 26 and 27 will be dedicated to ~~solidarity~~ equitable solidarity, and finally in § 28 we shall discuss the problematical case of ~~solid~~ solidarity by reciprocal

conditions.

quae sententia eo pertinet ut, quavis [vel huius vel illi decem solverit vel Seio Stichum] <sup>2</sup> nihilominus alteri obligatus [maneret] <sup>3</sup> [dicendum est ut] si decem alteri solverit, ab altero liberetur.

- 1) iudicium cum altero promissor acciperet,
- 2) maneret

(1)

D. (45.2)15. Gaius II de verb. obligat.

- α. Si id quod ego et Titius stipulamur, in singulis personis proprium intellegatur, non poterimus duo rei stipulandi constitui, veluti cum usum fructum aut dotis nomine dari stipulemur: idque et Iulianus scribit.
- β. idem ait, et si Titius et Seius decem aut Stichum qui Titii sit, stipulati fuerint, non videri eos duos reos stipulandi, cum Titio decem tantum, Seio Stichus aut ~~decem~~ ~~decem~~ decem debeantur:
- γ. quae sententia eo pertinet ut, quamvis [vel huic vel illi decem solverit vel Seio Stichum]<sup>1)</sup> nihilominus alteri obligatus [maneret]<sup>2)</sup> [dicendum est ut] si decem alteri solverit, ab altero liberetur.

1) iudicium cum altero promissor acciperet,

2) maneret

1) The omission of 'eundem' would in my opinion be quite regular, the preceding 'eadem' being sufficient to connect the two questions as parts of the same interrogatory. So also if Stichus had been mentioned first, the 'eadem' preceding 'decem' might, I consider, have been omitted on the same ground: cp. supra p. 42 ff.



We shall consider periods  $\beta$ . and  $\gamma$ . of this fragment first. Suppose a correal stipulation to be made as follows:

T.: Maeui, decem dari spondes?

S.: Maeui, eadem decem aut Stichum dari spondes?,  
we have no hesitation in pronouncing the act wholly void on account of the formal inequality of prestation. But the case contemplated by Gaius is that of a formally valid correal stipulation:

T.: Maeui, decem aut Stichum dari spondes?

S.: Maeui, eadem decem aut eundem<sup>1)</sup> Stichum dari spondes?,  
where the constitution of a correal obligation is prevented merely by the fact that Stichus happens to belong to T. The rule that no one can validly stipulate for what belongs to himself causes a material inequality of prestation which excludes the possibility of identification and hence of process-consumption.

Now ~~xxxxxx~~ what is the result of such a stipulation? The ancients, I venture to think, would have pronounced the whole act null and void, but, as period shows, this was not the view adopted by the mature classical jurisprudence.

Period  $\gamma$ . however shows evident marks of the compilers' hands. Its substantial faults are the omission of any reference to process-consumption which was the all important matter from the classical standpoint, and also the contradiction between the first statement that solutio of X to either creditor ( or of Stichus to S.)

<sup>1)</sup> The omission of 'eundem' would in my opinion be quite regular, the preceding 'eadem' being sufficient to connect the two questions as parts of the same interrogatory. So also if Stichus had been mentioned first, the 'eadem' preceding 'decem' might, I consider, have been omitted on the same ground; cp. supra p. 62ff.

leaves the debtor bound to the other, and the second statement that solutio of X to either frees ~~from~~ him from the other. The text also bristles with formal defects; The verbs (with the exception of 'pertinet' have no subject, Ut + indic. (manet), if not absolutely impossible,<sup>1)</sup> is at any ~~rate~~ highly suspicious. The passage 'vel huic... Stichum' is inelegant as regards both the use of 'vel' (different particles should have been used to connect 'huic' and 'illi' and to connect the two branches of the clause) and the alternation of pronoun (huic, illi) and noun (Seio). Dicere + ut is at any rate highly suspicious.<sup>2)</sup> 'promissor'. So far as I am aware, no one has yet hit on a satisfactory restoration of  $\gamma$ , but I venture to suggest the following: Delete the defective 'vel huic...Stichum' passage; change 'manet' to 'maneret'; and delete ~~dicendum~~ 'dicendum est ut'.

By means of these comparatively simple, and, it seems to me, highly probable, restorations, we get a relation of simple solidarity; although litiscontestatio by one of the creditors would not extinguish the right of the other, yet solutio of X to one of them does so. This was, I believe, the only result that the classical jurisprudence could reach as an alternative to holding the entire act null and void. In particular I must reject Levy's suggestion<sup>3)</sup> that the result here was legal cumulation reduced in equity to solidarity. A correal stipulation

<sup>1)</sup> ~~thereby~~ -----  
cp. Kalb, Wegweiser, p. 101

<sup>2)</sup> Levy, Konk., p. 305; cp. VIR. II. col. 220 D.

<sup>3)</sup> Konk., p. 506; this learned writer regards 'judicial consumption by means of exceptio doli' as the most likely mode of excluding cumulation, and refers to Gaius D. (45.1) § 141.5 and Ulpian. D. (32) 11.21.



could never produce cumulation; ~~legal or otherwise~~; in fact <sup>n</sup>under the civil law it could never produce other than a process-consumption relation based on eadem res, and all that the classical jurisprudence does is to allow it to produce a solutio-consumption relation independent of eadem res.

Assuming the soundness of our restorations, the <sup>manipulations</sup> compilers' ~~restorations~~ present no difficulty. In the ~~first~~ first place they substituted a reference to solutio-consumption for the original reference to process-consumption, and in so doing inadvertently dropped the subject ~~ipromissor~~ 'promissor'. In the second place they changed 'maneret' to 'manet', the force of the 'irrealis' being now lost. In the third place they inserted 'dicendum est ut' in order to soften the contradiction between the two parts of the period.

One point in connection with *y.* deserves special attention. Gaius does not say that solutio of Stichus to S. frees <sup>the debtor</sup> ~~him~~ from T., and this omission has been a frequent source of trouble to commentators. Levy,<sup>1)</sup> indeed, summarily dismisses the point by observing that Stichus belongs to T.; this being so, the debtor could not <sup>it is inferred,</sup> give him to S. In my opinion, however, the difficulty cannot be got over in this simple manner. We must ask ourselves whether the debtor, if he procured a transfer of the property in Stichus from T. and then assigned the same to S., was thereby freed from T.?

The ~~xxxxx~~ correct answer to this last question is thought to be that the debtor was not freed from T. at law, but was ~~so~~ freed in equity. In the case before us

<sup>1)</sup> Konk., p. 505 n. 13

one of the obligations has a compound prestation-object in the alternative (Seio decem aut Stichum ~~aut~~ dari), while the other has a simple prestation-object consisting of one of the same alternative elements (Titio decem dari). In order then to establish equality of prestation-object for the purposes of simple solidarity, we must, I believe, interpret the first obligation as decem dari subject to the modality of an alternative prestation-object (aut Stichum). But under this interpretation Stichus must be left out of account so far as the simple solidary relation is concerned, for the modality affects the first obligation merely, not both. If then the common debtor, having acquired the property in Stichus, assigns the same to S., he is certainly under no further liability to the latter, but such solutio cannot at law prejudice the right of T. to claim X. On the other hand, however, it would be quite inequitable to allow T. to exercise this legal right. If the latent defect in the correal stipulation had not existed and correalty had therefore been established, solutio of Stichus to S. would of course have freed the debtor from T.; but the ~~xxxxxxx party's right to the latter's~~ position cannot in equity be rendered better as a consequence of the said defect and contrary to the evident intentions of parties.

We therefore reach the result that solutio of X to either T. or S. operates a full legal release of the common debtor, whereas solutio of Stichus to S. ~~xxxx~~ does not free the common debtor from T. at law, but does so in free him in equity. In fact I think it well within the bounds of probability that Gaius after continued somewhat as follows: sed si Stichus desierit Titii esse eumque

- 1) It is to be observed that if Stichus belonged to T. at the time of the stipulation, then even though he subsequently ceases to belong to T., the common debtor cannot give him to T. in fulfilment of the obligation; see D. (45.1) 128 (β) supra p. 113 f.



promissor Seio dederit, an a Titio liberetur, quaeritur. et Iuliano placet iure non liberari sed ~~ex~~ exceptione doli adiuvari.

We now turn to ~~period~~  $\alpha$ . The purport of this period is that two parties cannot with effect stipulate correally for a prestation which is 'individualised' by the person of the particular creditor, for the obvious reason that identification of the two prestation-objects is here impossible. Two appropriate examples are quoted, namely, an obligation usumfructum dari and an obligation (aliquid) dotis nomine dari.<sup>1)</sup>

It is important to observe the exact <sup>purport</sup> ~~significance~~ of Gaius's decision. He does not deny that I and Titius can stipulate for the same usufruct or for the same thing described as 'pro Seio et Titio', as a rule 'pro' in dotis nomine; all he says is that we cannot be constituted correal creditors. Thus leaving aside the obvious case of separate stipulations leading to cumulative rights, it would, I consider, be possible for us to stipulate jointly for the same usufruct so as to render ourselves entitled

<sup>1)</sup> We cannot here enter ~~any~~ into any detailed discussion of the various elements which caused a usufruct and ~~ex~~ a dos to be 'individualised' by the person of the usufructuary or husband. As ~~seems~~ regards usufruct we may remark that this right was always considered as of a peculiarly personal nature; cp. e.g. Paul. D. (45.3) 26: ususfructus sine persona esse non potest et ideo servus hereditarius inutiliter usum fructum stipulatur. Moreover a usufruct was, generally speaking, limited by the life of the usufructuary, so that it might vary in point of duration according as it was granted to this party or that. As regards dos it may be remarked that a dos was essentially designed to enable a particular husband to bear the burdens of a particular matrimonial relation; cp. Paul. D. (23.3) 56.1: ibi dos esse debet ubi onera matrimonii sunt. Moreover the matter of recovery of the dos was intimately connected with the duration of the husband's life and his matrimonial conduct, so that the position might turn out quite differently accordingly as the dos were granted to this husband or that.

assuming the nature of the prestation-object to admit of the same. I have already ventured the conjecture that

<sup>1)</sup> This assumption is necessary, for if either of us is not an actual or prospective husband he cannot be entitled at all; cp. D. (45.3) 26.





(2) in the mature classical period there were still some who held every active joint stipulation, even if distributively framed, productive of partition merely,<sup>1)</sup> and if this be so, a distributive interrogatory and partition cannot, in the active case, have been deemed irreconcilable. Under these circumstances partition was the obvious solution in the case before us where correality was excluded, the validity of the act being thus preserved without any resort to simple solidarity. If however a case should arise of ~~an active correal stipulation~~ where the nature of the prestat-  
ion-object excluded the possibility of partition, ~~xxxxxx~~ <sup>being</sup> then, ~~if the establishment of correality is impossible~~, simple solidarity would seem the natural result.<sup>2)</sup>

1) sed sine consensu stipulatio in rebus eius non potest operari enim in persona eius est voluntas propria consistant nec per aliam personam solvitur nec liberatur:

2) quamquam

3) tamen

- 1) With regard to period α, Levy's opinion (Konk., p. 504 n.1) is that the act must be declared inutilis, unless the ~~inner~~ inner relation or other circumstances show that one of the stipulators (ego) is materially entitled alone, while the other (Titius) is 'at the highest' solutionis causa adiectus. But how one of ~~the active parties~~ to a joint stipulation could ever be a mere solutionis causa adiectus, I have difficulty in seeing, and in any event it seems impossible that the ~~effect of the act~~ efficacy of the act should be dependent on the material conditions mentioned. Levy also suggests that Gaius may have added some remarks in the form of a 'divisio' after 'stipulemur' or 'scribit'; this suggestion is not improbable but we have no means of verifying it.

1) vide supra p. 134

(2) D. (45.2)5. Julian. XXII digest. the first place.

α. Nemo est nesciat [alienas] operas promitti posse et fideiussorem adhiberi in ea obligatione

β. <-><sup>1)</sup> taking on of 'vel promittendi' to 'duos reos stipulandi' constitui, the expression 'sicuti si' which

γ. et ideo<-><sup>2)</sup> nihil prohibet ~~xxx~~ duos reos stipulandi constitui [vel promittendi sicuti] si ab eodem fabro [duo rei stipulandi] easdem operas stipulantur,

δ. [et]<-><sup>3)</sup> ex contrario duo fabri <-><sup>4)</sup> eiusdem peritiae <-><sup>5)</sup> easdem operas promittere intelleguntur [et]<-><sup>6)</sup> duo rei promittendi fieri.<sup>7)</sup>

was added by the compilers for the purpose of generalisation (and, as we shall presently see reason to believe, in contradiction of the classical law), and that 'sicuti' and 'duo rei stipulandi' were

1) further added by them in view of this generalisation.  
sed sine consensu stipulatoris solvere eum non posse:  
operae enim in persona eius qui promittit propriae consistunt nec per alienas operas solutas reus liberatur:

2) as impossible that Julian did actually use these words.  
quamquam

3) tamen  
In period 5, as it stands, the emphasis seems to be on the words 'eiusdem peritiae'; the test whether

4) quamvis  
the can or cannot bind themselves correally

5) nec  
whether or not they are of the same skill. But

6) nec  
surely no classical jurist would ever have set up a

7) The restoration given by Beseler, III..p.142, to which we shall have occasion to refer, is as follows:

Nemo est qui nesciat alienas operas promitti <non> posse [et] <nec> fideiussor<sup>em</sup> adhiberi in ea obligatione, et ideo [nihil prohibet] <nec> duos reos ~~xx~~ stipulandi constitui [vel promittendi sicuti] si ab eodem fabro duo [rei stipulandi] easdem operas stipulantur: et ex contrario duo fabri [eiusdem peritiae] easdem operas <inutiliter> promittere intelleguntur [et] <nec> duo rei promittendi fieri.

'prohibet' seems perfectly genuine in Papinian, D. (46.3)41 (not cited by Beseler); 'nihil vetat' in Gaius D. (44.2)15 (Beseler, II.p.146) seems likewise genuine.



We shall consider periods  $\gamma$  and  $\delta$  in the first place. That Julian wrote these periods in their present ~~form~~ form is quite impossible. In  $\gamma$  we at once remark the awkward tacking on of 'vel promittendi' to 'duos reos stipulandi constitui', the expression 'sicuti si' which is  $\epsilon\lambda\pi\alpha\varsigma \lambda\epsilon\gamma\acute{o}\mu\epsilon\nu\omicron\nu$  in the sense of 'for example if', though well authenticated in the sense of 'in like manner as if',<sup>1)</sup> the inelegant repetition of 'duos rei stipulandi'. We therefore delete the words 'vel promittendi sicuti' and 'duo rei stipulandi';<sup>2)</sup> there can be little doubt that 'vel promittendi' ~~was~~ <sup>was</sup> added by the compilers for the purpose of generalisation (and, as we shall presently see ~~reason~~ <sup>ea</sup> to believe, in contradiction of the classical law), and that 'sicuti' and 'duo rei stipulandi' were further added by them in view of this generalisation. Beseler also takes exception to <sup>the words</sup> 'nihil prohibet' (= οὐδὲν κωλύει) as betraying the Greek hand. But, while admitting the force of his argument, I cannot regard it<sup>3)</sup> as impossible that Julian did actually use the ~~said~~ words.

In period  $\delta$ , as it stands, the emphasis seems to be on the words 'eiusdem peritiae'; the test whether two smiths can or cannot bind themselves correally ~~is~~ is whether or not they are of the same skill. But assuredly no classical jurist would ever have set up a test of such a vague and altogether subjective nature. Beseler proposes to delete 'eiusdem peritiae', but it is

1) VIR., V. col. 529, 539.

2) 'duo' is unnecessarily retained by Beseler.

3) 'nihil prohibet' seems perfectly genuine in Papinian. D. (46.3)41 (not cited by Beseler); 'nihil vetat' in Gaius D. (44.2)15 (Beseler, II. p. 146) seems likewise genuine.

however imposed in the passive case. That such an ~~xxxxxx~~ much more probable that these words were found in inversion of Julian's decision ~~the actually xxx~~ place Julian's text.

is rendered highly probable by Ulpian, D. (46.3)31:

Now as to the restoration of Julian's argument.

In the first place we observe that the compilers by their introduction of 'vel promittendi' in *l.*, have made the same principle apply to both the active and the passive case, and this <sup>very</sup> fact renders it highly probable that originally the two decisions were different; the words 'ex contrario' in *l.* also render a slight support to this view. In the second place we observe that on principle there seems no reason why two parties <sup>h</sup>ould not be correal-ly entitled to the same operae, for services in general are certainly not individualised by the person of him to whom they are rendered.<sup>1)</sup> In the third place, however, we observe that services, at any rate if they are to any appreciable degree skilled, are essentially individualised by the person of him who renders them, and the more highly skilled they are, the more pronounced the individualisation becomes. Hence the law may, with good reason, refuse to admit that (skilled) services to be rendered by one individual can ever be identified with (skilled) services to be rendered by another individual, for the purpose of constituting a passive correal obligation.

If we assume the foregoing observations to represent the substance of Julian's argument, then what the compilers have done is to invert the decision so as to make the passive case agree with the active, a quite impracticable condition as to equality of skill being

<sup>1)</sup> The question how far 'operae officiales' were individualised by the ~~xxxxxx~~ person of the patron to whom they were due, does not seem to arise here.

they had adhered to the rule regarding the passive individualisation of services, would have been perfectly justified, from the standpoint of the Justinianian law, in inverting Julian's decision.



however imposed in the passive ~~xxxx~~ case. That such an inversion of Julian's decision <sup>was</sup> ~~did~~ actually <sup>carried out.</sup> ~~take place~~ is rendered highly probable by Ulpian. D. (46.3)31:

Inter artifices longa differentia est et ingenii et naturae et doctrinae et institutionis. ideo si navem a se fabricandam quis promiserit [vel insulam aedificandam fossamve faciendam]<sup>1)</sup> [et hoc specialiter actum est ut suis operis id perficiat], fideiussor ipse aedificans [vel fossam fodiens]<sup>2)</sup> non consentiente stipulatore, non liberabit reum. . . .

No one at the present day can have any doubt that the passage 'et hoc...perficiat' is due to the compilers.

*ability*  
Ulpian, arguing from the fact that artisans differ immensely in respect of skill, natural <sup>at</sup> ~~quantities~~ <sup>qualities</sup>, education and training, lays down the rule that, without the creditor's consent, a fideiussor cannot validly perform a piece of work which his principal has undertaken; the fideiussor merely guarantees that the principal will perform and has no duty or right to perform himself. The compilers, on the other hand, only admit this rule where it has been specially agreed that the principal shall carry out the work by his personal efforts. In other words they decline to recognise that operae are <sup>on principle</sup> ~~necessarily~~ individualised by the person of him who renders them; in a concrete case indeed they may be so individualised, in particular, where it is agreed that a certain <sup>party</sup> shall render them personally.<sup>2)</sup>

1) 'vel insulam...fodiens' and 'vel fossam fodiens' ~~seem to be glosses.~~

2) We shall see later (p. 233) that the compilers, even if they had adhered to the rule regarding the passive individualisation of services, would have been perfectly justified, from the standpoint of the Justinianian law, in inverting Julian's decision.

If the foregoing argument be sound, then the substantial point in the restoration of  $\delta$  is fixed, namely, that Julian denied the possibility of two smiths binding themselves correally to perform a piece of handicraft. As regards the details of restoration, I propose to substitute 'tamen' for the initial 'et', to insert 'quamvis' before 'eiusdem peritiae', to insert 'nec' before 'easdem', and change the 'et' before 'duo rei promittendi' into 'nec'. The <sup>meaning</sup> ~~meaning~~ then is that <sup>(expert)</sup> ~~the~~ services rendered by two smiths, even where the latter are of the same skill, are never deemed to be the same, and accordingly even though two smiths make a formally unimpeachable correal promise to render <sup>such</sup> services, they are not deemed to be correal debtors. The ~~insertion of~~ <sup>inserted</sup> 'nec' before 'easdem' seems much preferable to Beseler's ~~insertion of~~ 'inutiliter'; the point is that the services are materially incapable of <sup>being ~~the same~~ of identification</sup> identification. Finally we have only to insert 'quamquam' or the like before 'nihil prohibet' in  $\gamma$ , and our restoration of the two periods is complete.

We now turn to period  $\alpha$ . Any attempt to give 'alienae operae' another meaning than 'operae to be rendered by a third party' seems out of the question, so that we have here an unmistakable antinomy with the classical law; cp. for example, Ulpian.D.(45.1)3<sup>8</sup> pr.: ~~nam~~ 'nemo autem alienum factum promittendo obligatur,' and Hermogenian.D.(46.1)65: 'factum alienum inutiliter promittitur.' Numerous attempts at restoration have been made,<sup>1)</sup> but none of these can in my opinion be pronounced successful. It will be sufficient to note Mommsen's proposal,<sup>2)</sup> which Beseler follows, to insert 'non' before 'posset' and change 'et'

<sup>1)</sup> see Binder, p.24 n.59.



to 'nec'. In the first place we observe that the words valid 'in ea obligatione' assume the existence of a/principal obligation, and in the second place, ~~we ask, what classical~~  
~~jurist would have thought it necessary to deny that~~  
 valid we ask, if there was no/principal obligation, /what a classical jurist would have thought it necessary to deny that a fideiussor could accede thereto?

My own suggestions as to period  $\alpha$ , are as follows: In the first place I observe that in Inst. III. 19.21, the compilers adhered to the classical rule: qui alium facturum promisit, videtur in ea esse causa ut non teneatur, nisi poenam ipse promiserit. I accordingly conjecture that in our ~~present~~ present period  $\alpha$ , the word 'alienas' represents rather a corruption of Julian's text due to inadvertence on the compilers' part than a deliberate interpolation designed to alter the classical law regarding promises of facta aliena. In the second place I observe that the preliminary remarks of Julian in  $\alpha$ , were to all appearance intended to lay a foundation for a decision that operae could not be promised by two parties correally. In the third place, founding on D. (46.3)31 (cit.), I conjecture that Julian deduced the impossibility of/a <sup>such</sup> correal promise <sup>directly or indirectly</sup> from the incapacity of a fideiussor validly to perform himself the operae promised by his principal without the creditor's consent.

I therefore reach the conclusion that the compilers must have deleted a passage which formed the sequel to  $\alpha$ ; this conclusion is somewhat supported by the fact that, as the fragment stands, we should have expected period  $\alpha$  to terminate with a verb instead of with ~~the~~ <sup>likewise</sup> phrase 'in ea obligatione'. In the notes I have ventured a suggestion as to how this deleted period may have run; if it contained the word 'alienas' there is no inherent

unlikelyhood that the latter may, through carelessness services, or only where the services were of such have got incorporated into  $\alpha$ , in the process of interpolation. a skilled nature that the personality of the workman

To the question whether Julian wrote anything, and if so what, in the place now occupied by 'alienas', ity. We may point out, however, that it would be hard to no certain answer can be given. 'Aliqua', 'alicuius artificii', 'alii(sc. quam patrono) eas', may be mentioned as possible conjectures, but all discussion on this point must be reserved for a study on Opera libertorum, to which context our present fragment doubtless belonged.

The substantial soundness of our restorations being assumed, we now ask, what was the actual effect of them and cannot therefore be the prestat-on-object of a passive correal stipulation for operae. Consider such a stipulation ~~xxx~~ as:

T.: Maevi, statuum aeneam Apollinis facere spondes?

Sei, eandem statuum aeneam Apollinis facere spondes  
Ex hypothesi this stipulation cannot create correality, and on a strict application of civil law principles it must, we believe, be pronounced wholly null and void.

But the language employed by Julian in period  $\delta$  (as restored) seems to imply that such an act was not invalid. Well, if this be so, aspartition is out of the question, only one result is possible, namely simple solidarity, and on principle we believe that this was the precise result which the classical jurisprudence must arrive at. Quite likely Julian after  $\delta$  proceeded to explain this result, just as Gaius did in D.(45.2)15.

The only remaining ~~question~~ question is whether the classical law excluded the possibility of correality in the case of all obligations for the rendering of



services, or only where the services were of such a skilled nature that the personality of the workman made an appreciable difference. To this question no certain answer is possible in the absence of authority. We may point out, however, that it would be hard to draw the line between 'individualised' and 'non-individualised' services, and the probabilities are therefore not in favour of such a distinction being admitted by the classical jurisprudence. Accordingly we deem it safer to lay down one general rule that operations of any description are individualised by the person of him who performs them and cannot therefore be the prestation-object of a passive correal obligation.

The case of a passive correal stipulation containing a latent defect which induces material inequality of prestation is not ~~xxx~~ mentioned in the sources. If such a case were to arise, no doubt the result would be simple solidarity likewise.

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D. (46.2)6 pr. Ulpian. XLVI ad Sabin.

Si ~~stipulatus~~ ita fuero stipulatus: 'quanto minus a Titio debitore exigatur, tantum [fideiubes] <sup>1)</sup>?' non fit novatio, [quia non hoc agitur ut novetur].

D. (45.1)116 Papinian. IV quaest.

β.

~~Decem~~ Decem stipulatus a Titio, postea quanto minus ab eo consequi posses si a Maevio stipularis, sine dubio Maevius universi periculum potest subire: <sup>2)</sup> sed et si decem ~~petieris~~ petieris a Titio, Maevius non erit solutus, nisi iudicatum Titius fecerit. <sup>3)</sup>

γ.

Paulus notat: non enim sunt duo rei Maevius et Titius eiusdem obligationis, sed Maevius sub conditione debet si a Titio exigi non poterit:

δ.

igitur [nec Titio convento Maevius liberatur (qui an ~~debitus~~ debiturus sit, incertum est) et solvente Titio non ~~liberatur~~ liberatur Maevius (qui nec tenebatur, cum condicio stipulationis deficit), nec Maevius pendente stipulationis condicione recte potest conveniri]

ε.

a Maevio [enim] ante Titium excussum non <sup>2)</sup> recte petetur.

)

fide tua promittis. This seems a more likely restoration than spondes, for if Ulpian had used the latter

word the compilers would probably not have interfered with it. ~~petieris~~ Fide promittere is of course here used in the principal, not the accessory, sense; see Levy, Sponsio, p.7 ff.

2)

Eisele, ZSS.30. p.143, deletes 'et' by way of emendation, in my opinion wrongly.

4 by Krüger, Dig.)<sup>3)</sup>

Eisele, l.c. attributes 'nisi iudicatum Titius fecerit' to the compilers, but I cannot by any means concur in this view.



D. (46.3)21 Paul, X ad Sabin.

- §. Si decem stipulatus a Titio, deinde stipuleris a Maevio<sup>1)</sup> quanto minus ab illo consecutus sis, etsi decem petieris a Titio, non ~~tamen~~<sup>a</sup> absolvitur Maevius<sup>1)</sup>: quid enim si condemnatus Titius nihil facere potest?<sup>2)</sup>
7. sed et si cum Maevio<sup>1)</sup> prius egeris, Titius in nullam partem liberatur: incertum quippe est an omnino Maevius<sup>1)</sup> ~~liberatus~~<sup>debiturus</sup> sit. stipulation.
- 8 denique si totum Titius solverit, nec debitor fuisse videbitur Maevius<sup>1)</sup>, [quia condicio eius deficit].<sup>2)</sup>
1. D. (12.1)42 Celsus VI digest.
- Si ego decem stipulatus a Titio, deinceps stipuler a Maevio<sup>1)</sup> quanto minus a Titio consequi possim, si decem petiero a Titio, non liberatur Maevius<sup>1)</sup>, alioquin nequiquam mihi cavetur: at si iudicatum fecerit Titius, nihil ultra Maevius<sup>1)</sup> tenebitur.
- K. sed si cum Maevio<sup>1)</sup> egero, quantumque est quo minus a Titio exigere potuero eo tempore quo iudicium inter me et Maevium acceptum est, tanto minus a Titio postea petere possum.

<sup>1)</sup> Paul and Celsus ~~use Seius in place of Maevius but~~  
~~have preserved~~ call the guarantor 'Seius', but I have preserved the name 'Maevius' throughout.

2) apparently a gloss; 'condicio eius' (his condition = the condition of his obligation) seems hardly fruitful.

These passages present to us the relation which we call that of principal debtor and independent guarantor by stipulation. As already indicated,<sup>1)</sup> the discussion which this relation caused seems undoubtedly due to the fact that it did not easily fit in with the principles of the civil law.

In the first place we note that Ulpian in period ~~governed?~~ thinks it necessary to deny novatory effect to the second ~~guarantee~~ stipulation. The argument in favour of novation was specious. As Papinian says in  $\beta$ : 'Maevius ~~universi~~ universi periculum potest subire'; is the position not then substantially that M. ~~x~~ promises the same X as T. has already promised? The classical jurisprudence however rejected this argument, which if accepted would have rendered independent guarantee by stipulation ~~impossible~~ obligation impossible. The second ~~stipulation~~ pre-supposes the continued ~~existence~~ subsistence of the first; moreover its prestation-object is an uncertain sum not exceeding X, while that of the first is a fixed sum of X.

In the second place, novation being thus disposed of, the question arises whether the relation of the two obligations is not necessarily one of formal accessoriness. If this question be answered in the affirmative, S. is in the same position as a fideiussor, and litis-contestation has extensive consuming effect. Such a result would however destroy the utility of the guarantee altogether. The ~~xx~~ creditor must be able to sue T. without losing his right of recourse against M. <sup>should</sup> ~~for whatever~~ <sup>in full</sup> ~~ever~~ he fails to recover from the former. Otherwise, as Celsus says in l., 'nequicquam mihi cavetur', and the same idea <sup>being also</sup> is apparent in Paul's question in  $\gamma$  'quid enim si condemnatus Titius nihil facere potest?' Accordingly we are bound to treat the relation of T. and M. as governed by other principles than the relation of principal

1) *supra* p 157.



debtor and fideiussor. It is clearly the existence of an accessorial relation that Paul in <sup>u</sup>denies with the words 'non enim sunt duo rei M. et T. eiusdem obligationis'. In the absence of unity of cause no one would suggest that M. and T. were correal debtors.

In the third place then we ask what precisely are the principles by which the relation in question is governed? If we could regard T. and M. as standing in a relation of simple solidarity, the position would be plain, but this result never seems to have been suggested. The reaction of the civil law against anything in the nature of solidarity without unity of cause is such that jurisprudence must abandon any attempt to fix the basis of the relation on extensive solutio-consumption. Two methods of solving the problem are given by Celsus and Paul respectively.

The <sup>new</sup> ~~view~~ of the older jurist Celsus is as follows. The creditor can sue either T. or M. in the first instance. If he sues T., M. is not freed by process-consumption, but if T. satisfies the judgment, M. is under no further liability, - 'nihil ultra tenebitur'. (period 1.). <sup>In this latter case</sup> Celsus, it will be observed, does not say that M. is 'freed', as he would be if extensive process-consumption were to operate; the words <sup>'nihil ultra tenebitur'</sup> quoted mean that nothing is now due under M.'s obligation at all, - in fact the position is ~~the~~ the same as if this obligation had never existed; this result, as we shall see presently, is brought out with greater distinctness by Paul. Naturally the same result will take place if <sup>T.</sup> makes a voluntary solutio without being sued. On the other hand, if the creditor decides to proceed against M. in the first instance, ~~the position is~~ T.'s resources must be evaluated as at the time of litiscontestatio in this action. Suppose it is

According to my restoration, it will be observed, 'nihil ultra tenebitur' comes first in its clause. In this position it is generally speaking, suspicious, but by no means impossible; e.g. in Paul, D. (45 11) pr. 1.2. the genuineness of the

(old text of Paul's)

ascertained that T. is able to pay VI of the ~~XX~~ sum of X due; the creditor's right against M. is then limited to the remaining IV, and ~~quoad~~ <sup>quoad</sup> this IV his right against T. is consumed.<sup>1)</sup> Such ~~at~~ at any rate is my interpretation of the difficult period K <sup>2)</sup> ~~Thxxxxxxxx~~

Paul agrees with Celsus in holding that litis-contestation with T. does not free M. (period J.), and he brings out with greater clearness the result that if T. makes solutio, M.'s obligation is rendered null and ~~void~~ <sup>void</sup> ab initio. ~~it never reaches perfection through failure of the condition to which it was subject (period G)~~ <sup>M. ~~will~~ not be deemed to have been a debtor at all (period B')</sup>

But he ~~denies~~ <sup>de</sup> Celsus's doctrine as to the position where the creditor sues M. in the first instance. Litiscontestation in this action, he holds, does not free T. to any extent, because it is not yet certain whether M. will owe anything (period H.). In other words M. cannot be condemned until T. has been discussed, so that if the creditor sues M. in the first instance, the proceedings must be hung up, until the discussion of T. is accomplished; if the creditor presses for judgment before the latter event, M. must be absolved. Hence Paul, in effect, deprives the creditor of his right of 'electing' T. or M. in the first instance, and so does away with any suggestion as to their relation being solidary.

We have a very succinct statement of Paul's view in his note to Papinian D. (45.1) 116 (periods J. - E.), if we eliminate the ~~clumsy~~ <sup>awkward</sup> gloss <sup>(period D. after 'igitur')</sup> with which this note has been encumbered.<sup>3)</sup> According to my restoration, what Paul says is : T. and M. do not stand in an (accessorial) eadem res relation, but on the contrary T. only incurs (principal) liability if the full amount cannot be exacted from T.; therefore M. cannot effectively (recte) be

<sup>3)</sup> Beseler, III. p. 63, 110, deletes the whole of periods D. and E., but this is too drastic.

According to my restoration, it will be observed, 'igitur' comes first in its clause. In this position it is generally speaking, suspicious, but by no means impossible; e.g. in Paul. D. (46.1) 71 pr. i.m. the genuineness of the

(cta foot of next page)

the debt is in effect  
as at the date of  
litiscontestation with M.

Bes. XXIII. 1. 44

the latin scholia  
II. p 640 f.)



sued before T. has been discussed.

It will be observed that nothing is anywhere said of the effect of solutio by M. on the obligation of T., but we have no difficulty in holding that ~~this~~ this effect is nil. T. remains under the same liability as before, and M., <sup>or even after payment has been made, 1)</sup> on making payment, is clearly entitled to an assignment of whatever rights the creditor may have against him.

We may assume that the late classical jurists generally adopted the same view as Paul regarding the ~~relation~~ relation of principal debtor and independent guarantor by stipulation; that is to say, by ~~depriving~~ depriving, in effect the creditor of his right of election, they excluded this relation from the sphere of solidarity altogether. Let us, however, suppose that this view had not been adopted, but on the contrary that the creditor's right of election had been preserved intact. Let us further ignore the doctrine of Celsus that, if the creditor sues M. in the first instance, liability is partitioned according to the state of T.'s resources as at the date of litiscontestatio in this action, and assume that the creditor can obtain judgment for the full amount from M. Is the relation of T. and M. thus established on a solidary basis? This question, I believe, must be answered in the negative. Even if the classical jurists had taken up the view here suggested, they would, it is thought, have been bound to deny the existence of extensive solutio-consumptio. Solutio by M. would still have no effect in freeing T. and solutio by T. would ~~not~~ still not free M., but ~~not~~ would render his obligation null and void ab initio.

(ctd from last page) words: 'igitur alterum reum eiusdem pecuniae non liberari' is beyond dispute; so also is the

significance of the words: 'igitur finito primo mense primae pensionis usuras currere ...' in <sup>Paul</sup> D. (12.1) 40, 1. m.

1) cp. Papinian D. (46.3) 95. 10 (sent to be <sup>considered</sup> ~~disputed~~) : 'quamquam pecunia soluta sit'.

(21) D. (46.1) 13 <sup>1)</sup> Julian. XIV digest.

α. Si mandatu meo Titio decem credideris et mecum mandati egeris, non liberabitur Titius: sed ego tibi non aliter condemnari debebo quam si actiones quas adversus Titium habes mihi praestiteris. item si cum Titio egeris, ego non liberabor, sed in id dūtaxat ~~tam~~ tibi obligatus ero quod a Titio servare non potueris.

β. D. (46.3) 95.10. Papinian. XXVIII quaest.

Si mandatu meo Titio pecuniam credidisses, eiusmodi contractus similis est tutori et debitori pupilli: et ideo mandatore convento et damnato, quamquam pecunia, soluta sit, non liberari debitorem ratio suadet, sed et praestare debet creditor actiones mandatori adversus debitorem, ut ei satisfiat. et hoc pertinet tutoris et pupilli debitoris nos fecisse comparisonem: nam cum tutor pupillo tenetur ~~et~~ ob id<sup>d</sup> quod debitorem eius non convenit, neque iudicio cum altero accepto liberatur alter nec, si damnatus tutor solverit, ea res proderit debitori.... 2)

2) It must be ever kept in mind that a mandator  
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2) as to remainder of this paragraph see Partsch, Negotiorum Gestio, I. p. 62 n.f.; Krüger. Dig., App. IV.

1) reproduced almost verbatim in Gaius D. (14.1) 27.5.



Until Justinian altered the law by Novel 4 of the year 535, a creditor had a right of election as between a principal debtor and a mandator.<sup>1)</sup> Yet, as the above passages show, the relation of principal debtor and mandator was not thereby established on a solidary ~~xx~~ basis.<sup>2)</sup> Solutio by the mandator does not free the principal debtor but entitles the former to an assignment of the creditor's rights against the latter, and it is further to be inferred that ~~xx~~ solutio by the principal debtor does not free the mandator but renders his obligation non-existent ab initio. Though the relation of principal debtor and mandator was of course unknown to the old civil law, yet here again we see the principles of the latter making their influence felt by way of reaction against solidarity without unity of cause. ~~st~~

1) Cp. also Papinian D.(17.1) 56 pr.

2) It must be ever kept in mind that a mandator pecuniae credendae (and likewise a constituens alieni debiti and an argentarius recipiens) was formally a principal debtor, though from the material standpoint his liability was accessory to that of another.





In this celebrated paragraph Ulpian is no doubt dealing primarily with ~~xxx~~ the case where the debtor himself is the 'constituens', but this case and that where the ~~constituens~~ 'constituens' is a third party are governed by fundamentally the same principles. If we take the paragraph ~~xx~~ as it stands and apply its words to the case last mentioned, we seem to have, according to ~~Ulpian~~ ~~xxxxxxx~~ ~~xxxxxxx~~ what is stated to be the 'safer' view, an instance of simple solidarity without unity of cause. The principal and the 'constitutory' obligations of course originate from different facts, yet apparently extensive consuming effect is attributed to solutio, though ~~xx~~ denied to litiscontestatio.

It may however be regarded as perfectly certain that Ulpian did not write this paragraph in its present form, though so far as I am aware no one has yet succeeded in proposing a tenable restoration. In the first place Seckel<sup>1)</sup> has drawn attention to the fact that the perfect 'fuit' at the commencement of the paragraph does not agree very ~~well~~ well with the present 'tutius est dicere', and he suggests that it was the compilers who relegated the controversy to the past. The point is however of small importance, and I am prepared to let 'fuit' stand. In the second place, as the actio de pecunia constituta was a <sup>a</sup>pretorian action in factum, it is inaccurate to speak of this action consuming, not merely the creditor's principal action-right, but the principal obligation itself.<sup>2)</sup> In the third place, it is impossible to believe that Ulpian used the harsh <sup>expression</sup> phrase 'solutione ex hac actione facta'; moreover the <sup>word</sup> 'potius' is superfluous and indeed false. In the <sup>fourth</sup> ~~fifth~~ place, we note the

<sup>1)</sup> Haftung de peculio in Aus röm. u. burg. Recht (Festschrift f. Bekker, 1907) p. 347 n. 4.

<sup>2)</sup> Levy, Konk., p. 64; cp. supra p. 115

<sup>3)</sup> Seckel, l.c., n. 6 deletes 'ex hac actione facta'.

awkward tacking on of 'non litis contestatione' to 'liberationem contingere', which is quite in accordance with the methods of the compilers. In the fifth place, the concluding motive 'since solutio enure to the benefit of each obligation' apparently implies an antithesis to litiscontestatio, but such an antithesis is false from the classical standpoint, for litiscontestatio may equally enure to the benefit of each obligation, and in any event the argument involves a petitio principii (*solutio liberationem contingere, quoniam solutio ad utramque obligationem proficit*)

Now with a view to attempting a restoration of Ulpian's original text, let us ~~ask ourselves~~ as a start ask ourselves if it is at all likely that a 'vetus dubitatio' existed on the question whether litiscontestatio in an actio de pecunia constituta consumed, directly or indirectly, the principal obligation. In my opinion it is highly unlikely that any serious doubt existed on this point at all. Process-consumption could only operate extensively if the constitutory obligation were treated as formally accessory to the principal obligation, in other words, assuming ~~that~~ the constituents to be and principal debtor ~~are~~ different parties, if the constituents were deemed to be in the same position as a fideiussor. Well if a constituents had been deemed to be in this position, the classical law could hardly have excluded the beneficium divisionis as between ~~several~~ several constituents, but Justinian's constitution C.(4.18)3 shows that the latter were not accorded this benefit till the year 531. But quite apart from this special argument, I can ~~hardly~~ have little doubt that the classical law did not regard a constitutory obligation as accessory in the formal sense. This obligation derived its force entirely from the <sup>a</sup>prætorian law, and to treat it as standing in an eadem res relation with a principal civil law obligation would be quite anomalous.





or after action was on principle immaterial, - ~~ipse~~ ipso iure consumed the principal obligation likewise, though ~~litiscontestatio~~ *the strict civil* had no such effect, but ~~this result was~~ *law did not countenance such a result.* ~~contrary to the fundamental principles of the civil law.~~

*the two obligations  
from different  
and did not  
in a formally  
and relation.*

In the converse case where payment was made under the principal obligation the difficulty could be got over by holding that the constitutory obligation was not indeed consumed, but rendered non-existent ab initio. Payment under the constitutory obligation, however, clearly could not so affect the principal obligation.

How then did Ulpian solve the problem? Here the clue seems to lie in the word 'potius', which is quite impossible as it stands, but which, by the very reason of its impossibility, was in all likelihood <sup>found</sup> ~~taken~~ by the compilers in the original text. ~~Ulpian~~ Suppose Ulpian to have written 'tutius est dicere per exceptionem doli potius quam ipso iure liberationem contingere', and the whole position becomes plain. Ulpian admits the force of the common sense argument, ~~xxxxxxxxxxxx~~ in favour of solutio-consumption, but nevertheless does not recommend any derogation from strict civil law principles. Indeed no such derogation was at all necessary, for an equitable exceptio doli would give the debtor ample protection. To complete our restoration we have only to substitute 'quamquam' for 'quoniam' and insert 'sortid' after 'solutio'. The decision then runs as follows: Solutio under the constitutory obligation is best regarded as endowed with merely an equitable consuming effect on the principal obligation, though solutio of the principal debt (legally) enures to the benefit of each obligation.

1) -----  
Ulpian, according to our restoration, only mentions the case where solutio was made after action brought (qui ex hac actione solvit), because, the principal debtor and the constituens being the same, a voluntary payment would naturally be attributed to the sors.



As already indicated, payment under the principal obligation may quite reasonably be held to render the constitutory obligation non-existent ab initio, and Ulpian's avoidance in the final clause of any reference to consumption, ~~(he does not say that solutio by the one <sup>under</sup> ~~freed~~ <sup>obligation consumes</sup> the other)~~ justifies the conjecture that he thus construed the result of solutio sortis.

*he does not  
'solutio sortis utramque  
consumit' -*

The substantial soundness of our restorations being assumed, the compilers' manipulations of the paragraph need not cause any serious difficulty, familiar as we now are at the present day with their extraordinary modes of operation. The whole question whether solutio under the constitutory obligation consumed the principal obligation must have seemed to them trivial; of course 'solutio ad utramque obligationem proficit', they must have thought. But, assuming always that the principal debtor and constituens are one and the same, does litiscontestatio under the one obligation consume the other? This question still remained open, for Justinian's abolition of extensive process-consumption could only apply where there were different parties on the debtor side. Now very probably Ulpian in a preceding context which the compilers deleted, raised the question whether litiscontestatio had extensive consuming operation in the case before us, and he must have given a negative answer. The compilers therefore conceived the brilliant idea of making the present paragraph <sup>deal</sup> ~~deal~~ with this question and interpolated it accordingly.

Let us now glance at the case where the constituens and the principal debtor are different parties. If solutio were granted extensive consuming effect, then we ~~shall~~ should have a simple solidary relation without unity of cause. But by adhering, in accordance with Ulpian's advice, to strict civil law principles we avoid this

result. Solutio by the principal debtor renders the constitutory obligation non-existent ab initio, while solutio by the constituens leaves the ~~principal obligation~~ creditor's right against the principal debtor ~~intact~~ legally intact and capable of assignment to the constituens. Yet the creditor had the right of electing either the principal debtor or the constituens under the classical law, for the constituens (*ἀντιφωρητής*<sup>1)</sup>) was expressly granted a beneficium excussionis, along with the fideiussor and the mandator, by Novel 4. In all this we can again trace the influence of the civil law antagonism to solidarity without unity of cause, though of course the ~~real~~ relation of principal debtor and ~~constituens~~ constituens was unknown to the civil law.

The foregoing criticism and exegesis remove, I believe, for the first time, all difficulty from our present paragraph. The result attained ought to be specially acceptable to Levy,<sup>2)</sup> for it eliminates one of the most serious obstacles to his theory of process-consumption

~~non-existent ab initio. Here again we are~~  
entitled to trace the influence of the civil law reaction

against solidarity without unity of cause. The par-

1) wrongly translated 'sponsor' in the Collectio.

2) see Konk., p. 64.

to relate any suggestion that the recipiens is formally an accessory debtor: if he were so, then solutio must have an extensive consuming effect.

1) argentarium

2) receptum

3) argentario

4) see Lenel, Pal., II., col. 492; ~~see~~ ZSS., 2. p. 66 f.

5) the words 'apud eum' indicate (arg. e. contr.) that equity will prevent the creditor from proceeding against the debtor after he has received from the recipiens.



(4) D. (17.1)28. Ulpian. XIV ad edict. *Solidarity.*

Papinianus libro tertio quaestionum ait [mandatorem  
debitoris] <sup>1)</sup> solventem ipso iure reum non liberare  
(propter ~~quia~~ <sup>2)</sup> [mandatum] enim suum solvit et suo nomine )  
ideoque [mandator] <sup>3)</sup> actiones putat adversus reum cedi  
debere.

This fragment comes from a context dealing with the actio reciproca, <sup>4)</sup> and I believe it must originally have referred to the receptum argentariorum. 'Mandatum debitoris' is hardly possible, more particularly as the debtor is immediately thereafter described as 'reus'. If my restoration be sound, then we have the relation of principal debtor and ~~argentiarius~~ argentarius recipiens governed by precisely the same principles as the two relations last discussed. The creditor undoubtedly has a power of electing the debtor or the recipiens, but solutio-consumption does not operate; on the contrary, <sup>at law 5)</sup> solutio by the recipiens does not free the debtor, and, as solutio by the debtor renders the receptum obligation ~~non-existent~~ non-existent ab initio. Here again we are entitled to trace the influence of the civil law reaction against solidarity without unity of cause. The par-  
enthetical clause 'propter...nomine' is apparently intend-  
ed to refute any suggestion that the recipiens is formally an accessory debtor; if he were so, then solutio <sup>(and also litiscontestatio)</sup> must have an extensive consuming effect.

1) argentarium

2) receptum

3) argentario

4) see Lenel, Pal., II., col. 492; ~~ZSS.~~ ZSS., 2. p. 66 f.

5) the words 'ipso iure' indicate (arg. e contr.) that equity will prevent the creditor from proceeding <sup>himself</sup> against the debtor after he has recovered from the recipiens.

is here stated)

must likewise hold,

Equitable solidarity is the result produced where two obligations stand at law in a cumulative relation, but equity prevents the recovery of more than the full prestation due under either of them. For the ~~sake~~ sake of simplicity we shall confine our exposition to the passive case.

Legal cumulation being a condition precedent to equitable solidarity, the two obligations must originate from different causes, for unity of cause and cumulation are mutually inconsistent. Accordingly we have here a relation converse to simple solidarity; the latter is a ~~legal~~ legal, not an equitable, relation, and the ~~principles~~ principles of the civil law strongly oppose its existence without unity of cause.

The ground on which equity reduces a legal cumulative relation to one of solidarity is that both obligations are based on the same material cause, are directed to the same juristic end, are designed to fulfil the same economic interest. Whether in a particular case equitable relief will be granted on this ground, depends on the general principles of the ius honorarium, and, we should probably add, to some degree on the 'conscience' of the individual praetor.

The most important question which arises is whether equity, in reducing a legal cumulative relation to one of solidarity, will treat ~~the~~ solutio, or its equivalent,<sup>1)</sup> as the sole consuming agent, or will attribute extensive consuming effect to litiscontestatio also; in other words, is equitable solidarity modelled after a simple solidary or a correal pattern? According to the principle 'equity follows the law', we are probably justified in saying that as a general rule equitable solidarity admits the extensive consuming ~~effect~~ effect of litiscontestatio, though it would be rash to

1) as to accumulation cf. *supra* n. p. 153 n. 2.



affirm that the praetor's hands were tied in this respect so as to prevent him doing substantial justice according to the circumstances of each concrete case.

The normal sanction of equitable solidarity lies in the praetor's power of refusing actions and granting exceptions. The simplest mode of reducing a legal cumulative relation to equitable solidarity is for the praetor to refuse a creditor who has received payment from, or sued, one debtor, any further action against the other. But it will often be more convenient for the praetor, instead of himself deciding whether a further action should be granted, to grant the action subject to an exception, the question whether or not/<sup>an</sup> equitable consumption should be recognised being thus left immediately to the iudex. If equitable solutio-consumption is pleaded, an exceptio doli would seem in all cases to be sufficient for this purpose; if equitable process-consumption is pleaded, an exceptio in factum modelled after the exceptio rei iud. vel in iud. ded. would seem more ~~appropriate~~ appropriate. In the case of bonae fidei iudicia, however, we must always bear in mind the iudex's power of considering all points of <sup>equity</sup> good faith without any exception, and also of refusing to pronounce a condemnation in the action unless the plaintiff relinquishes another action-right. But into these details we cannot enter here.

The praetor's power of ~~granting~~ refusing of actions and granting exceptions would enable him to give effect to the pure idea of 'subjective alternativity'.

For example, two obligations decem a Maevio dari, and domum a Seio aedificari both in favour of Titius, might in equity be treated ~~as~~ as alternative in the sense that T. can claim fulfilment of either, but solutio or

perhaps an  
addi would even  
also.

litiscontestatio under the one extinguishes the other ~~entirely~~ entirely, though no 'substantial equality of prestation' is here present. We may however conjecture that in such cases the praetorian law <sup>clings</sup> as far as possible to the idea that solutio- and process- consumption can only operate as between prestations which are ~~extremely~~ ~~substantially~~ ~~equal~~ equal. In the illustration given, probably the prestation domum aedificari would be valued in money, say at XV or X+V; an equitable solidary obligation would then be deemed to exist between the two obligations decem dari, ~~extremely~~ a simplex obligation quinque dari being left outstanding. Therefore ~~after having received X from M.~~ ~~but, if the house be not duly built, T., after having recovered X from M., is still entitled to sue S., but in this latter action the condemnation must be limited to V. Again if T., has merely joined issue with M., and extensive process-consumption operates, the condemnation against S. must be similarly limited. The rules governing equitable process-consumption are necessarily of a somewhat lax flexible nature.~~ <sup>thus, we think,</sup> At law, the consuming effect of litiscontestatio is absolute; if the two obligations decem a Maevio dari and <sup>d</sup> Domum a Seio aedificari stood in a legal process-consumption relation, litiscontestatio with M. in respect of the full X, must consume T.'s right against S. in its entirety. Equity on the other hand <sup>it is thought,</sup> cannot decline to admit the possibility of a process-consumption relation between one obligation and a part of another, the remainder of the latter having an independent existence.

The foregoing principles will to some extent be illustrated in the following section by reference to D.(46.2)28. Meanwhile, however, let us consider a simple case of equitable solidarity: M. asks T. for a loan of X; T. agreed to make the loan but on one condition only, namely, that M. and a third party S. will promise each independently



of the other to pay him X. The following stipulations are accordingly entered into:

T.: Maevi, decem dari spondes?

M.: spondeo

T.: Sei, decem daro spondes?

S.: spondeo.

As a result of these stipulations M. and S. are of course cumulatively liable at law, but, as ex hypothesi, only a single sum of X is lent, it would be contrary to good faith for T.

to exact more than a single sum of X; the material cause, <sup>is</sup> the juristic end, the economic interest, ~~are~~ one and the same <sup>as regards</sup> in the case of both obligations. Accordingly if, <sup>let us say,</sup> ~~say,~~ M., pays the full X due, and T. then attempts to sue S., the praetor will either refuse this latter action altogether or render it nugatory by means of an exceptio doli. But further, it would appear that in the ordinary case, if T. merely joins issue with M. in respect of the full X., he is precluded from thereafter <sup>vi</sup> ~~suing~~ S.; any subsequent action against the latter will either be refused or be rendered nugatory by means of an ~~exception~~ <sup>in factum</sup> in the nature of an exceptio ~~of~~ rei iud. vel in iud. ded., <sup>or, it may be, an exceptio doli.</sup>

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<sup>1)</sup> The question of interest is here ignored.

D. (46.2)28. Papinian. II definit.

- α. Fundum Cornelianum stipulatus, quanti fundus est postea stipulor: [si non novandi animo secunda stipulatio facta est] cessat novatio:
- β. secunda vero stipulatio tenet ex qua non fundus sed pecunia debetur.
- γ. itaque si reus promittendi fundum solvat, secunda stipulatio iure non tollitur, nec si litem actor ex prima contestetur:
- δ. <->
- ε. denique meliore [vel deteriore] facto [sine culpa debitoris postea] fundo [praesens aestimatio ~~max~~ fundo petito recte consideretur, in altera vero] <-> ea aestimatio venit quae secundae stipulationis tempore fuit.

η. in deductionem

Clearly, the text is written by Papinian.

op. Ulpian. (47.2)28. The text is also distinguished.

it is unnecessary to say that the text is also distinguished.



immediately

Titius stipulates from Maevius: fundum Cornelianum

xx\*xx\*xx All this is ~~xxxxx~~ highly instructive.

Clearly period 8. cannot have been written by Papinian

it is unnecessary now to argue that the passage 'si non novandi, facta est' must be interpolated.

as it stands. We note the following formal defects: 'Sine culpa debitoris' can only refer to 'deteriore', while grammatically it should refer to 'meliore' also; 'postea' is in a false position and the point of time to which it refers is not stated; ~~fundum~~ 'fundo petito' following so close on 'facto... fundo' is inelegant; the present subjunctive 'consideretur' could not have been written by a classical jurist; there is nothing with which 'altera' can agree. We further note the triviality of the decision. The action on the second stipulation is an actio ex stipulatu in which, by virtue of the words of the stipulatory formula ' quanti fundus est', the value of the fundus obviously must be taken as at the date of this stipulation. The action on the first stipulation is a condictio certae rei and the value of the fundus for purposes of condemnation must of course be taken as at the date of ~~litis~~ litiscontestatio in this action, unless indeed the fundus has deteriorated through culpa or after mora of the debtor.

The clue to the restoration of period ~~II~~ lies, I think, in the phrase 'ea aestimatio venit, which seems to call for 'inductionem'! If then from the preceding part of the period we eliminate everything but 'denique meliore facto fundo', we seem to have the case where the fundus has increased in value since the date of the second stipulation, and T., in ~~suing~~ suing for it under the first stipulation, can, it is held, only recover its present value less the value as at the date of the second stipulation. But such deduction of the value of the fundus as at the date of the second stipulation is intelligible on one assumption only, namely, that T. has already joined issue under the second stipulation. If T. had recovered under the second stipulation without action, naturally the deduction would only extend to the amount actually paid. Thus we get the position that T. first of all sues on

1) True 'venire in deductionem' does not occur in any recorded text; but in Javolen. D. (16,2)14, apparently the compilers have substituted 'compensationem' for 'deductionem' in the phrase 'in compensationem non veniunt'; 'venire in compensationem' also occurs in Ulpian. D. eod. 6, and in Gai. IV. 66, 67 we have 'in compensationem vocari', 'in deductionem vocari'.



the second stipulation, then finding that the ~~fm~~ fundus has increased in value since the date of the latter, he sues on the first stipulation ~~for the fundus~~. Under such circumstances the decision is that T., whether or not he has realised anything by his original action, can in this fresh action only recover the present value of the fundus less its value as at the date of the second stipulation. 1)

Here we see equity operating by means of extensive process-consumption to prevent cumulation. At law T., though he has already joined issue under the second stipulation, is still ~~entitled~~ entitled to recover the full present value of the fundus under the first stipulation, but equity restricts his right as aforesaid. T. must submit to a limitation of the condemnatio in the formula of the <sup>subsequent</sup> ~~second~~ action, <sup>under the first stipulation,</sup> otherwise this ~~latter~~ <sup>action</sup> will be refused or rendered nugatory by means of an ~~exception~~ exception.

Now it will be observed that period ~~f.~~ <sup>(as restored)</sup> ~~is restored and~~ <sup>affords</sup> period ~~ε.~~ deal with ~~converse~~ ~~same~~ situations, and that we have no decision as to the equitable result in the two cases ~~indicated~~ indicated in ~~f.~~, that is, (i) where ~~T. has joined issue under~~ M. has made a voluntary solutio of the fundus and (ii) where T. has joined issue under the first stipulation; nor again have we any <sup>reference to</sup> ~~decision in~~ the case where M. has made a voluntary payment under the second stipulation. It would appear then that only a fragment of Papinian's original decision has been preserved, and that of this decision period ~~ε.~~, as indicated by the particle 'denique' formed the conclusion. Accordingly we have little hesitation in holding that something has been deleted between ~~f.~~ and ~~ε.~~.

The substance of this deleted passage (period ~~ε.~~) we can restore with practical certainty. Papinian must have laid down: (i) if M. makes voluntary solutio of the fundus,

1) Our restoration of ~~ε.~~ does not pretend to be more than ~~partially~~ partial.

and T subsequently sues on the second stipulation, he (T.) can, in equity, recover only the amount, if any, by which the value of the fundus as at the date of the second stipulation exceeds its present value, though at law, he would be entitled ~~xxx~~ recover its full value as at the date of the second stipulation; (ii) if T. has joined issue under the first stipulation (it is quite immaterial whether he has or has not realised anything by this action), and he now sues on the second stipulation, he can in equity recover only the amount, if any, by which the value of the fundus as at the date of the second stipulation exceeds its value as at the date of the previous litiscontestatio under the first stipulation, though at law ~~he~~ he would be entitled as aforesaid; ~~But~~ clearly in neither of these two cases could T. recover under the second stipulation, if the depreciation of the fundus after the date of the second stipulation were due to his <sup>own</sup> culpa; (iii) if M. has made <sup>a voluntary</sup> ~~any~~ payment under the second stipulation, and T. then sues on the first, he (T.) can<sup>h</sup>, in equity, recover only the amount if any, by which the present value of the fundus exceeds the sum so paid, though at law he would be entitled to recover its full present value. Then followed period ~~E.~~ <sup>partially</sup> ~~(as asserted)~~.

Of course all this distinction between law and equity was antiquated from the Justinianian standpoint, and we have ~~therefore~~ therefore no difficulty in understanding the compilers' action in eliminating Papinian's argument, and ~~giving~~ giving us merely a banal statement as to the different bases of valuation in the two actions. Fortunately however they just left sufficient of the original text to enable us to see what Papinian was aiming at.

If we now assume that the two stipulations were from different parties, - that T. first stipulates from M.: fundum Cornelianum dari spondes? and then <sup>stipulates</sup> from S.: quanti ~~fundus Cornelianus quem M. mihi dare spondidit, tantum dari~~ ~~spondidit~~



~~fundus Cornelianus est quem Maevius mihi dare spondit,~~

fundus Cornelianus est quem Maevius mihi dare spondit,

dari tantum/~~dar~~ spondes? -the same principles are applicable as before. At law, the result is cumulation, but equity will

of solidarity being indirectly established by means of separate stipulations containing reciprocal conditions. This point is suggested by the following fragment:

D. (45.1)9. Pomponius II ad Sabin.  
Si Titius et Seius separatim ita stipulati essent: 'Fundus  
profitable one. But further the equitable solidarity thus

established is based on a correal pattern, for an extensive consuming effect is ~~attributed~~ attributed to litiscontestatio as well as to solutio. Even in equity the formal and artif-

icial conceptions of the civil law make their influence felt. by making solutio of the fundus to either T. or S., escapes

Solutio-consumption without process-consumption, ~~in either~~ all further liability to the other; moreover either is ~~enabled to 'occupy' by litiscontestatio.~~ It would therefore admitted where dira necessitas compels.

appear as if this was a case of active correality. But in the absence of unity of cause, correality is, according to our theory, excluded, and we thus seem to be involved in a hopeless dilemma.

With a view to explicating the situation, we shall first assume that the power which either creditor has of occupying by litiscontestatio is legal and not merely equitable. How can we hold that correality is here excluded? have we not an exact parallel to our present fragment in Gaius D. (45.2)10, where the creditors are described as *rei stipulandi*? The answer is that the fact of two creditors having each a legal right of 'occupation' does not in itself render them correal creditors; for occupation may depend on a concurrence of material rights as well as on a concurrence of actions. In D. (45.2)10 (citt.) undoubtedly ~~we have a~~ figured a case of ~~actione determinata in the name of~~ concurrence of actions, and litiscontestatio has extensive process-consuming effect. The party who has not joined issue, say

S., is deprived of his obligatory right by the litiscontestatio of the other, ~~and no one in classical times would~~

1) *Land*, *Pal.* II. ed. 59 places our present fragment in the middle of D. (30) 8.1.

2) *supra* p. 132

3) *Land* in note 2 on following page. In this connection the brilliant chapter *Die Abgrenzung des Konsumierungseffekts* in *Levy, Recht* p. 17 ff., particularly p. 47 ff.

We have now to consider the highly problematical point whether the classical jurisprudence admitted the possibility of solidarity being indirectly established by means of separate stipulations containing reciprocal conditions. This point is suggested by the following fragment:

D.(45.1)9. Pomponius II ad Sabin.

Si Titius et Seius separatim ita stipulati essent: 'fundum illum si illi non dederis, mihi dare spondes?', finem dandi alteri fore quoad iudicium acciperetur, et ideo occupantis fore actionem.

It is plainly assumed in this fragment that the debtor, by making solutio of the fundus to either T. or S., escapes all further liability to the other; moreover either is enabled to 'occupy' by litiscontestation. It would therefore appear as if this ~~xxx~~ were a case of active correality. But in the absence of ~~x~~ unity of cause, correality is, according to our theory, excluded, and <sup>at first sight</sup> we thus seem to be involved in a hopeless dilemma.

With a view to explicating the situation, we shall first assume that the power which either creditor has of occupying by litiscontestation is legal and not merely equitable. How can we hold that correality is here excluded? have we not an exact parallel to our present fragment in Gaius D.(45.2)16, where the creditors are described as duo rei stipulandi? The answer is that the fact of two creditors having each a legal right of 'occupation' does not in itself render them correal creditors; for occupation may depend on a concurrence of material rights as well as on a concurrence of actions. In D.(45.2)16 (cit.) undoubtedly ~~we have a~~ <sup>Gaius</sup> figured a case of action-concurrence determined in the sense of ~~concurrence of actions~~, and litiscontestation has extensive ~~process-consuming effect~~. The party who has not joined issue, say S., is deprived of his obligatory right by the litiscontestation of the other <sup>party</sup> M., and no one in classical times would ~~have imagined~~.

- 1) Lenz, Pal. II. col. 89 places our present fragment in the middle of D(30) 8.1.
- 2) *supra* p. 132.
- 3) ~~take in note 2 on following page~~ In this connection the brilliant chapter Die Abgrenzung des Konkurrenzgebietes in Levy, Konk., p. 17 ff., particularly p. 28 ff. should be consulted; cf also p. 377 of same work.

second book  
deals with  
out, and  
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tion was  
introduced  
of analogy  
may be reached  
in heres  
fundum Titio  
Seio dato,  
Seio dedit  
dato' 1)



have imagined any other result to be possible. But it may have been suggested that S., though no longer a creditor, was, by virtue of his original position as a correat of T., still entitled to receive payment on the latter's behalf, and apparently it is this suggestion that Gaius here contradicts. On the other hand where we have merely a concurrence of material rights, litiscontestation by T. has no extensive consuming effect; S. still remains a creditor and all the law can do is to hold his right of action meanwhile suspended. In other words T. by first joining issue has acquired a prior claim to the prestation, and neither can the debtor defeat this claim by rendering the prestation to S., nor can S. do so by suing the debtor, even though he should obtain condemnation before T. But the protection thus granted to T. will naturally be conditional on his acting in good faith and with due diligence in the matter. Should it become apparent that T. joined issue collusively merely in order to exclude S., or that he has no intention of prosecuting his action seriously, S.'s right may be held to revive.

Now if, as we for the present assume, the power of 'occupation' accorded to either creditor in this fragment is legal and not merely equitable, we must, I believe, regard the concurrence as of material rights only and not of

1) ~~vide ~~infra~~ supra p. ; cp. D. (45.1) 128 supra p.~~

2) In this connection the brilliant chapter Die Abgrenzung des Konkurrenzgebietes in ~~Levy's~~ Levy, Konk., p. 17 ff., particularly p. 28 ff., should be consulted. We might compare the case where the debtor makes a constitutum in favour of T. alone, but for the fact that Paul. D. (13.5) 10 apparently regards a constitutum as equivalent to solutio for purposes of consumption, so that the debtor is actually freed from S.

reciprocal conditions, equity is entitled to infer that both obligations are designed to fulfil the same juristic end.

But having reached this result, can we now say that the occupitory force attributed to litiscontestation depends

actions. T. by first joining issue acquires a prior claim to the prestation, but S. still remains a creditor. S.'s right is only extinguished when T. actually recovers the fundus. <sup>at first sight one would say</sup> ~~Thus we seem now~~ to have a case of simple solidarity based on solutio-consumption alone, though bearing a certain resemblance to a process-consumption relation by reason of the occupatory force attributed to litiscontestat-  
<sup>were</sup> <sup>legal</sup> <sup>might apparently</sup>  
 ion. If this ~~be~~ so, then a <sup>legal</sup> solidary relation ~~may~~ be constituted indirectly by means of separate stipulations containing reciprocal conditions.

<sup>touching the</sup>  
<sup>from another</sup>  
<sup>view, it</sup>  
<sup>is to be</sup>  
<sup>compelled</sup>  
<sup>the new</sup>  
<sup>stipulation</sup>  
<sup>by Pomponius</sup>  
<sup>legal solidarity.</sup>

~~But is the relation figured by Pomponius really~~  
 one of legal solidarity? In my opinion this question must be answered in the negative; the solidarity here established must ~~depend on the intervention of equity.~~ If we ask what is the actual legal effect of the two stipulations under consideration, the correct answer seems to be as follows: If, before any action is brought, the debtor renders the fundus to either T. or S., both obligations are simultaneously extinguished. On the other hand, before the fundus is rendered to either, both T. and S. are entitled to bring separate actions and this being done, no subsequent rendering of the fundus to the one can prejudice the other's right to judgment and execution; hence in this case the actual legal result is cumulation. Therefore, if in point of fact litiscontestat-  
 ion by the one operates as a bar to a further action by the other, we must hold this to be the result of equitable intervention. The ground of such intervention presents no difficulty. The prestation-object in both stipulations is one and the same determinate species which obviously cannot be rendered to both stipulators cumulatively. Hence by virtue of the reciprocal conditions, equity is entitled to infer that both obligations are designed to fulfil the same juristic end.

But having reached this result, can we now say that the occupatory force attributed to litiscontestat-  
 ion depends



on a legal concurrence of material rights? I ~~think~~ think not. What we have here is an equitable action concurrence determined in the sense of process-consumption. Litiscont<sup>5</sup>entation by T. excludes S. in equity, just as does ~~xx~~ solutio to T., though we must not go so far as to say that the praetor was debarred under all circumstances from granting a subsequent action to S. In short the case figured by Pomponius is simple one of equitable solidarity presenting certain singular features.

If the reader will attempt to ~~x~~ work out the position in the case of ~~xxxxxx~~ stipulations from different parties for the same determinate species and containing reciprocal conditions, he will, I think, have little difficulty in reaching the result that ~~here also~~ <sup>passive</sup> solidarity <sup>active</sup> can only be established through the aid of equity. Furthermore in the active or the passive case alike, where the prestation-object is generic, a fortiori any attempt to establish a legal solidary relation ex diversis <sup>stipulationibus</sup> ~~causis~~ by means of reciprocal conditions must fail.

two parties present together (inter praesentibus) with the force of a stipulation. This stipulation is of the highest significance. Previously the primary element in every stipulatory act was the intention which must formally set forth the whole terms of the contract. Now no interrogatory at all was required; every expression of consent constituted a binding agreement. Accordingly all references in the Corpus Iuris to formal interrogatory and response were, from the standpoint of the Justinianian law, to be regarded in the light of purely theoretical analyses. Just as it was customary to discuss contracts however concluded and in any other way accepted.

I also regard the following stipulation as a stipulatio and instrumentum and Diritto giustinianeo 135 et seq. (as proof: I

Chapter IV. Solidarity ex ~~xxx~~ stipulatu under the Justinianian law.

§ 2<sup>§</sup> Justinianian solidarity, joint and several.

In passing from the classical to the Justinianian law we feel ourselves entering <sup>almost a</sup> ~~an entirely~~ new world. The expositions of the great Roman jurists supplemented by authoritative decisions of the Roman emperors, still form the basis of the legal system, but the ~~xxxxx~~ atmosphere of the living law is entirely fresh, the doctrines and rules of the classical jurisprudence being now largely modified through the influence of Hellenic ideas and customs.

The contrast between the classical and the Justinianian systems is nowhere more marked than in the realm of stipulation. <sup>1)</sup>

In the first place stipulation was no longer a formal act. Leo's constitution of 472, ~~xxx~~ C. (8.37(38)) 10, enacting that all stipulations might validly be concluded 'non sollemnibus vel directis sed quibuscumque verbis pro consensu contrahentium', endowed any agreement made between two parties present together (inter praesentes) with the force of a stipulation. This degeneration of the stipulation is of the highest significance. Previously the primary element in every stipulatory act was the interrogatory which must formally set forth the whole terms of the prospective contract. Now no interrogatory at all was required; ~~xxxxx~~ <sup>oral</sup> any expression of consent constituted a binding agreement. Accordingly all references in the Corpus iuris to a formal interrogatory and response must, from the standpoint of the Justinianian law, be regarded in the light of purely theoretical analyses. Just as we are accustomed to analyse contracts, however concluded, ~~xxx~~ into an offer and acceptance,

*1) As regards the following citation I have to acknowledge much indebtedness to Riccobono, Stipulatio et instrumentum nel Diritto giustiniano, 225, 35. p 214 ff; 43. p 262 ff.; I hope to publish an ~~early~~ English translation of this work at an early date.*



so ~~x~~ we may assume the Justinianian lawyers made ~~x~~ use of the analysis into interrogatory and response after the model of the classical stipulation<sup>1)</sup>. Cases can however be quoted where the compilers of the Digest seems to have deleted the references to the now obsolete interrogatory.<sup>2)</sup>

In the second ~~xx~~ place Justinian by his constitution of 531, C.(8.37(38))14, gave almost every written contract the force of a stipulatio by means of a presumption that an oral agreement inter praesentes had been concluded. This constitution is somewhat difficult to follow, owing it would appear to the revisors of the Code having touched it up in rather a clumsy manner. Its actual provisions seem to be:

- (i) If a written contract purports to have been made by a slave of the creditor with the debtor, an absolute presumption is raised that the slave mentioned ~~habeantur~~ belonged to the creditor and did actually stipulate from the debtor;
- (ii) if a written contract purports to have been made by the creditor ~~habeantur~~ personally with the debtor, a presumption is raised that a stipulation was concluded, but this presumption can be rebutted by proof that during the whole day when the written contract was executed either the creditor or the debtor was absent from the town where it was executed; no other rebuttal was however allowed. Thus we see that by inserting<sup>3)</sup> the name of a slave as stipulator, any risk of a written contract being declared invalid on the ground of 'absentia' was avoided.

In this way the Justinianian stipulation 'absorbed' the litteral contract of the Eastern provincial customs.<sup>4)</sup> This absorption was not however quite complete.

1) see *z. D.(45.2) 13 p.* *infra* p 223

2) see *Riccobono, ZSS.*, 43.p.306, 326 ff.

The Justinianian law, as set forth in Inst. III. 21, ~~recognised~~ recognised a proper litteral contract where a written acknowledgment of a loan was made <sup>c</sup> cessante ~~scilicet~~ verborum obligatione. Litteral contracts proper were not of course subject to the provisions of C. (8.37(38))14 ; but, we venture to think, a document which purported to record a stipulatio could never be construed as an obligatio litterarum within the meaning of Inst. III. 21.

Under the Justinianian law, therefore, a stipulation might be either an oral or a written act and, having regard ~~xxx~~ the universal employment of writing for legal purposes in the East, we may ~~xxxxx~~ consider an unwritten stipulatio as <sup>comparatively</sup> of very rare occurrence. Nevertheless the compilers in their manipulations of certain classical texts continued to <sup>treat</sup> ~~regard~~ the stipulatio as theoretically oral.

When a stipulatio was concluded in writing, none of the formal requisites above described <sup>1)</sup> had any application, except in so far as the presence of the parties in the same town can be regarded as a formal requisite; when it was concluded orally, the requisite of 'praesentia' alone held good in reality. Yet the compilers did not eliminate the other requisites <sup>2)</sup> but sought rather to adapt them to the spirit and principles of the new law. In particular we must observe how they dealt with the requisite of continuous actus.

In our opinion, the requisite of continuous actus, as laid down by the mature classical jurisprudence, was made up of two rules, viz., 'continuous presence' and 'abstention'; provided these two <sup>r</sup>ules were observed, the elapse of an interval between the different stages of the act did not matter. <sup>3)</sup> Now obviously this requisite could have no possible application to the case

<sup>1)</sup> except that relating to the use of 'spondere', which had been obsolete from the time when Roman citizenship had ceased to ~~be~~ have any significance.



of a written stipulatio, and we must therefore assume that the compilers in dealing therewith had before their eyes a stipulatio concluded orally. Their mode of manipulating the requisite in question was as follows: The rule of continuous presence they modified so as to allow a 'modicum intervallum', during which the parties might separate, to come between different stages of the act, and the ~~rule~~ of abstention they modified so as to allow either party to perform between different <sup>stages</sup> of the act a 'modicus actus non contrarius obligationi'. The vague nature of these provisions clearly betrays their utter unpracticability; who is to define a 'moderate intervalk' or a 'moderate act not contrary to the obligation'? On the other hand, however, the compilers, by way of set-off to their attrition of the classical rules of continuous presence and abstention, introduced a ~~new~~ new rule, not found in the classical jurisprudence, namely, that the answer(s) must be given on the same day as the question is put. Under the mature classical jurisprudence, provided the parties did not separate and each abstained from all other business, there was in our opinion no theoretical objection to the answer being given a week after the question ~~had~~ had been put, though of course any such case was entirely unpractical. There is little difficulty in conjecturing where the compilers got the idea of their 'idem dies' rule, namely, in the ~~words~~ words of C.(8.37(38))14.2: 'si tamen in eadem civitate ~~ut~~utraque persona in eo die commanet, in quo huiusmodi instrumentum scriptum ~~est~~ est.' Here the stipulatory act is presumed to have been commenced and ended within the limit of a single day, to wit, the day on which the written instrumentum was drawn up.<sup>2)</sup>

1) it was not the admission of an intervallum per se, but the admission of an intervallum in which the parties might separate, that in our opinion constituted the derogation from the classical law.

2) cf. ~~Re~~ *Ricciolono* 255., 35. p 252 ff., particularly <sup>p.</sup> 254.

~~One~~ One of the most important innovations made by Justinian on the classical ius stipulationis was in the matter of novation. By a constitution of 530, C. (8.41(42)) 8, ~~this Emperor~~ <sup>he</sup> provided that novation was no longer to take effect by force of law, but only where the parties made an express declaration in that behalf. If a promise were made which in ancient times would have had ipso iure novatory effect, the obligation created by such promise and the <sup>prior</sup> ~~pre-existing~~ obligation were henceforth to co-exist side by side, unless the parties expressly declared that the <sup>prior</sup> ~~latter~~ obligation was to be remitted, and the <sup>later one</sup> ~~former~~ to take its place: (pr.) sancimus...nihil penitus priori ~~x~~ cautela<sup>e</sup> innovari, sed anteriora ~~stare~~ stare et ~~x~~ posteriora incrementum illis accedere, nisi ipsi specialiter remiserint quidem priorem obligationem et hoc expresserint quod secundam magis pro anterioribus elegerint.

It is to be observed, however, that to all appearance the classical law of novation had undergone a considerable degeneration before Justinian's time. In § 1 of the same constitution ~~x~~ the Emperor says: et generaliter definimus voluntate solum esse, non lege, novandum, ~~quod~~ etsi non verbis exprimatur ut sine novatione, quod solito vocabulo *ἀνοβατίσιν* dicunt, causa procedat. These words seem clearly to infer that before 530 parties could always exclude novation by an express agreement to this effect, and all Justinian therefore did was to reverse the rule in the sense that novation should not now take ~~effect~~ place unless expressly provided for. But in my opinion under the classical law, novation could not be excluded by agreement merely, except in certain <sup>ai</sup> ~~special~~ special and well defined cases.<sup>1)</sup> Moreover the representation of the pre-existing

<sup>1)</sup> notably where it was desired to take a sponsor or fidepromissor bound separately from the principal debtor, which case will be discussed in my treatise on Accessoriality; cp. supra p. 51



state of the law in Inst. III. 29. 3a cannot be altogether reconciled with the rules of the classical jurisprudence on the subject and seems to imply a post-classical development.

We now ~~turn~~ turn to the mode of constituting solidary relations under the Justinianian law. Needless to say, such a thing as a classical correal stipulation was quite unknown in Justinianian practice, though fortunately the compilers of the Institutes thought it worth their while to set forth the ancient form for the benefit of students. As stipulation now depended<sup>5</sup> for its force essentially on the consensus contrahentium, the constitution of a solidary relation ex stipulatu ~~must be~~ <sup>is</sup> based on ~~the~~ <sup>this same</sup> material fact of consent. ~~likewise~~. An important point must however here be noted. As a result of Justinian's constitution C. (8. 41(42)) 8, if for example, M. owes X to T. and S. ~~promises~~ promises T. the same X as M. owes but nothing is said as to novation, ~~S.~~ <sup>S.</sup> becomes a solidary debtor with M., even where latter does not know or does not approve of S.'s promise. <sup>1)</sup>

The case last mentioned suggests a distinction between two forms of Justinianian solidarity:

(i) where the solidary relation is constituted <sup>by</sup> ~~with~~ the ~~common~~ common consent of all the parties on the one ~~side~~ or the other; this we shall call Justinianian ~~solidarity~~ <sup>joint solidarity</sup> or Justinianian correality. The jointness of the relation here depends on the communis consensus entirely; it is of no consequence whether the ~~jointly~~ different obligations are created by one act or several, or whether all are created simultaneously or one after the other, provided always each creditor or debtor consents to the accession of the others. Obviously, active solidarity can only be joint in the present sense, because one creditor

1) ~~apparently the same result took place before 530 if novation were expressly excluded.~~ apparently the same result took place before 530 if novation were expressly excluded.

*under the post classical law*

cannot have another solidary creditor added to him without his consent;

(ii) where one debtor being already bound, another solidary creditor is added without his ~~know~~ (the first debtor's) knowledge or consent; ~~This distinction between joint and several solidarity, the~~ this we shall call 'Justinianian several solidarity.'

This distinction between joint and several solidarity may be utilised by the law for a number of purposes; for example, a beneficium divisionis, or ~~the~~ mutual rights of regress independent of any inner relation or of cessio actionum, may be admitted as between joint, but not <sup>as</sup> between several, solidary debtors. Justinian's constitution C. (8.39(40))4(5), which permitted an inter-<sup>occurring</sup> ruption of prescription/in favour of, or against, one ~~xx~~ solidary creditor, or debtor, to enure to the benefit, or prejudice, of all, deserves attention in this connection, for the language here employed is applicable only to the case of joint solidarity: ( § 1) 'in uno eodemque contractu'; ( § 4) 'cum ex una stirpe unoque fonte unus effluxit contractus vel debiti causa ex eadem actione apparuit'. Likewise we believe the provisions of Novel 99 to be applicable only to joint solidarity.<sup>1)</sup>

It is with Justinianian joint solidarity, or Justinianian correality, that we are mainly concerned, several ~~x~~ solidarity presenting no difficulty.

If a Justinianian correal relation is to be constituted by written act, the normal course will be for ~~x~~ a single document to be drawn up embodying the whole transaction. The only point that requires attention here is the possibility of the contract being declared wholly or partially void on the ground of 'absentia' as defined by C. (8.37(38))14. Suppose the document attests a correal stipulation made by the creditor T. ~~with~~ personally with

<sup>1)</sup> vide infra p. 235ff.

<sup>2)</sup> vide infra p. 228, 232ff.



the co-debtors M. and S., and it is proved that either T. or both M. and S. were absent from the town where the document was drawn up during the whole day on which it was drawn up, the contract will be wholly void. If it is proved that one of the debtors, say M., was so absent, the contract will be void so far as he is concerned, but a valid simplex obligation will be created between T. and S. On the other hand, however, there was nothing to prevent a correal relation being established by ~~separate~~ means <sup>of</sup> separate documents forming part of the same transaction. Here then we have the possibility of T. resident, say, at Constantinople stipulating correally from M. resident, say, at Rome and S. resident, say, at Carthage, purely by means of written documents. As we have seen, if a slave of the creditor were inscribed as stipulator, the presumption in favour of the due conclusion of a stipulation was absolute. All that T. then has to do in order to take M. and S. bound correally is to get M. to send him a document stating 'Sticho Titii servo stipulanti Maevius promisit, ita ut is et Seius duo rei promittendi essent', and to get S. to send him a corresponding document. Here the intentions of parties to create

correality are manifest, and as no proof is admissible that the stipulations were not actually made, we must hold a correal relation to be duly established. In such a case it is perfectly natural to say that T. has taken M. and S. bound as correal debtors 'ex diversis locis', i.e. 'from' Rome and Carthage, the precise form of expression which we find in D. (45.2)9.2 (itpd).<sup>1)</sup>

In the next place let us ~~imagine~~ suppose that a correal relation is to be created orally. Here it is necessary for the single party on the one side (T.) to meet with each of the parties on the other side (M. and S.),

<sup>1)</sup> vide infra p. 224, 245

but on principle there does not seem any necessity that M. and S. should themselves meet, provided each intends to bind himself correally with the other. The compilers, however, for the purposes of their expositions proceed on the basis that all three parties meet to conclude a single joint act. Here the interesting point is ~~xxxx~~ the manner in which they deal with the classical requisite of 'continuous actus', namely, by allowing a 'modicum intervallum' in which the parties may separate and a 'modicus actus non contrarius obligationi' to be interposed between any two stages of the proceedings, in particular between the two hypothetical answers, but on the other hand by insisting that both answers shall be given on the same day as the hypothetical question is put.

Finally we must observe that until Justinian altered the law by Novel 99 of the year 539, the question whether two joint debtors were liable singuli in solidum or pro rata depended solely on the intentions of parties. Even where a document attested a simple joint stipulation, e.g. 'Titio stipulanti Maevius et Seius promiserunt', it was open to the creditor to prove that the creation of solidarity had actually been intended. This rule is perfectly intelligible. Under the classical law, if a cautio stipulatoria were in the above form and hence, according to Papinian. D.(45.2)11.2, was evidence of pro rata liability merely, the creditor was quite entitled to prove by other evidence that a distributive form of joint stipulation had actually been employed and solidarity therefore established. Likewise under the Justinianian law, where the intentions of parties had taken the place of stipulatory forms, similar proof was admissible. Presumably the same principles applied in the case of an active joint contract also.



(3) Ulpian, D. (47.2.1.1) ...  
The remainder of this ~~xxxx~~ chapter is distributed as follows:

In the next section ( § <sup>29</sup>~~30~~ ) we shall illustrate the foregoing observations from certain interpolated texts. Then (§§ 30 and 31) we shall deal with and illustrate Justinian's abolition of extensive process-consumption. Finally ( § <sup>2</sup>~~32~~ ) we shall consider Novel 99.

In the second place it is essential to assume that 'you the stipulans' are the actual creditor and not a slave acting on his behalf. Had the *clausula stipulatoria* run 'stipulanti tibi Stichus Titius servus...', the validity of the contract could not, in my opinion, have been challenged on any ground of 'absentia'.

In the third place it is essential to assume, not merely that one of the debtors, say M., was <sup>not present</sup> ~~was~~ when the document, but that he can be proved to have been absent from the town where, during the whole day when, it was made. On the other hand, it must equally be assumed that M., in spite of his absence on this occasion ~~xxxxxxx~~ had actually consented to the transaction, otherwise of course there could be no question of him being bound at all.

In the fourth place we note that the question whether the debtors, M. and S., are, assuming the contract to be formally valid, rendered liable *singuli in solidum* or merely *pro rata*, depends entirely on the intentions of parties (*quod iuris est contrahentium actum est*). The terms of the *clausula stipulatoria* indeed serve merely to establish a *simplex pactio* leading to partition, but the creditor is entitled to prove, if he can, an intention to render *solidum*.

Under these circumstances the decision is perfectly intelligible. If the intentions of parties were to constitute S. and M. *pro rata* debtors, then S. is remains liable in *solidum* if M. is eliminated; if their intention was to constitute M. and S. *pro rata* debtors

- (1) Ulpian. D. (45.2)8. supra p. 44

We have now to interpret this fragment as an exposition of Justinianian law.

- (2) In the first place we observe that the document contains a clausula stipulatoria, which fact excludes the idea of a literal contract proper; hence the provisions of C. (8.37(38))14 must apply.

In the second place it is essential to assume that 'you the stipulans' are the actual creditor and not a slave acting on his behalf. Had the clausula stipulatoria run: 'stipulanti tibi Stichos Titii servo...', the validity of the contract could not, in my opinion, have been challenged on any ground of 'absentia'.

- (3) In the third place it is essential to assume, not merely that one of the debtors, say M., was <sup>not present</sup> ~~absent~~ when the document, but that he can be proved to have been absent from the town where, during the whole day when, it was made. On the other hand, it must equally be assumed that M., in spite of his absence on this occasion ~~xxxxxxxxxx~~ had actually consented to the transaction, otherwise of course there could be no question of his being bound at all.

- (4) In the fourth place we note that the question whether the debtors, M. and S., are, assuming the contract to be formally valid, rendered liable singuli in solidum or merely pro rata, depends entirely on the intentions of parties (quid inter contrahentes actum sit). The terms of the clausula stipulatoria indeed serve merely to establish a simple joint contract leading to partition, but the creditor is entitled ~~xxxxxxxxxx~~ to prove, if he can, an intention to create correality.

Under these circumstances the decision is perfectly intelligible: If the intentions of parties were to constitute M. and S. correal debtors, then S. ~~is~~ remains liable in solidum, though M. is eliminated; if their intentions were to constitute M. and S. pro rata debtors



the elimination of M. cannot increase S.'s pro rata liability  
 ly be erroneous. The inelegant words 'licet ante prior

- (2) Pomponius D.(45.2)4. supra p. 46

The representation given in this fragment of a stipulation as consisting of a formal interrogatory and response has of course no practical place in the Justinianian law. If my previous conjecture that the compilers have deleted references to the necessity of a distributive form of interrogatory in a correal stipulation, be sound, then the significance of the ~~xxx~~ fragment from the Justinianian standpoint must be that, where a joint agreement is made orally, no special form of words is required to create correality, as opposed to partition, provided an intention in that behalf is evident.

- (3) Javolen. D.(45.2)2. supra p. 49

Here again we note the absence of all reference to the necessity of a distributive form of interrogatory in a correal stipulation; everything depends on the intentions of parties.

- (4) Ulpian. D.(45.2)3 pr. supra p. 53

In this pr. the compilers set forth the new law of correality without unity of cause, for which purpose they have, as I believe, adapted a text of Ulpian's dealing with sponsors or fidepromissors taken bound apart from the principal debtor. Justinian's constitution C.(8.41(42))8 had removed all fear that the second of the two promises would novate the first, unless the parties expressly declared that it should do so. || Period 6 is not happily framed, for at first sight it seems to ~~infer~~ refer to the case where T. interrogates M. and S. correally, and

//h?

(7) a certain interval elapses between their respective answers. Such an interpretation would, however, certainly be erroneous. The inelegant words 'licet ante prior responderit, posterior etsi ex intervallo accipiatur' simply mean that first of all the one debtor is taken bound alone, and then after an interval the other is taken bound alone, so that we have two separate acts, oral or written. The words 'pristinam obligationem durare ~~et sequentem accedere~~ et sequentem accedere' are an obvious adaptation of the 'antiora stare et posteriora incrementum illis accedere' of C. (8.41(42))8; cp. Inst. III.29.3a 'manere et pristinam obligationem et secundam ei accedere'. Moreover the inappropriate Period f. is a very clumsy adaptation of Ulpian's original text, but its import is perfectly clear: Provided the debtors M. and S. intend to be constituted correal debtors, it is immaterial whether they are taken bound together or separately; for novation cannot take place without an express declaration to that effect.

(5) Pomponius D. (46.1)43. supra p. 55

Here the second principal stipulation is not declared to be made novandi animo; hence novation does not operate, as it must have done under the classical law. The actual decision as to the two fideiussors not be co-fideiussors for the purposes of the beneficium divisionis does not here concern us.

(6) Ulpian. D. (46.2)8.5. supra p. 58 infra p. 231

Period g. of this fragment shows us the new law of novation. ~~see further infra p.~~ See also period E. of

D. (46.2) 31.1. supra p. 133.



(7)

1)

in which case, if both answers are given within the time fixed, a correal obligation is validly constituted even though there is a break between them, yet, even where no such period is fixed, the elapse of a moderate interval of time, or the performance by any of the parties of a ~~moderate~~ moderate act not contrary to the obligation, between the giving of the two answers, will not prevent the constitution of a correal relation.<sup>1)</sup>

*interrogatoriae being now obsolete.* In the first place we note that these provisions have no application where the stipulation is concluded by means of written acts, one or more, but only where it is concluded orally. In the second place we note that ~~that~~ during the moderate interval of time the parties may separate as appears from the interpolations in D. (45.1) 1.1, and this possibility of separation though not here mentioned is the really vital point. The classical jurisprudence we believe did not exclude the possibility of an interval of time elapsing between different stages of a stipulatory act, but insisted on the parties remaining continuously present throughout the interval; the compilers ~~abolished~~ <sup>abolished</sup> this rule of continuous presence by allowing the parties to separate. In the third <sup>place</sup> we note that, as already remarked,<sup>2)</sup> the ideas of 'modicum intervallum' and 'modicus actus non contrarius obligationi' are too indefinite for practical use, so that they can only represent a piece of doctrinaire attenuation by the compilers of the classical law.

Period I. admits the possibility of a fideiussor being taken bound between the principal debtors. From the standpoint of the Justinianian law this is altogether trivial,<sup>3)</sup> and we are therefore safe in conjecturing that we have here simply an adaptation of Julian's text, which point will be discussed in our treatise on Accessoriality.

~~2) supra p.~~

~~2) supra p.~~

1) note quominus + indic., which if not absolutely impossible in classical law Latin, is at any rate in the highest degree suspicious.

4) note also the non-committal expression 'may seem not to impede' prevent



In the inelegant period  $K$  the same ideas of 'modicum intervallum' and 'actus non contrarius obligationi' (not even qualified as 'modicus') reappear.

- (8) ~~XXXXXXXXXX~~ Venuleius D. (45.2)13 pr. supra ~~xxx~~ p. 104

I consider it in the <sup>high</sup>est degree probable that the compilers have substituted 'promissuri' for 'interrogati' in period  $\alpha$ , formal interrogatories being now obsolete, but yet in order to save the period from being simple non-sense, we must assume that the co-debtors, M. and S. have been jointly inter<sup>r</sup>rogated. If there are here two separate stipulations, that is to say, if M. promises <sup>X</sup> today and S. promises tomorrow eadem decem quae M. promisit, the statement that S. is not bound is obviously false. Assuming, however, the existence of a joint interrogatory, then the purport of period  $\alpha$  is that both answers must be given on the same day as the hypothetical interrogatory is put, and that any answer given thereafter is invalid. All this represents the application of the compilers' 'idem dies' rule to the case of the correal stipulation; the utter impracticability of the whole situation needs no further remark.

Period  $\beta$ , as it stands, seems capable of two explanations: (i) <sup>in the case where</sup> ~~if~~ the stipulator or the (second) promisor has meanwhile departed to other business, although... or (ii) since the stipulator or the (second) promisor will have gone away meanwhile to other business, although...

If the first interpretation be adopted, the inference is that even if the second answer be not given till the following day, it will be valid, provided no other business has meanwhile intervened. If the second interpretation be adopted, we seem to have an attempt at justification of the 'idem dies' rule; it must be inferred that if

the interval is extended overnight, other ~~such~~ business will be attended to of such a nature as to break the continuity of act. The second interpretation seems preferable, but the whole matter is entirely without ~~import~~ importance; the compilers' manipulations of the classical requisite of continuous actus are too devoid of all ~~real~~ reality to deserve serious attention.<sup>1)</sup>

(9) Papinian. D. (45.2)9.2. infra p. 259, 275 //

It is certain that the passage 'cum duos ~~re~~ reos.... habebitur' (period I.) was not written by Papinian. The expression 'duos reos promittendi <sup>a</sup> facere ex diversis locis' can only mean that the creditor gets two parties to send him correally related promises from different places, an idea absurd from the ~~classical~~ standpoint, but, as already shown,<sup>2)</sup> perfectly intelligible under the Justinianian law. This being so, we see that the verb 'stipulati' does not here connote an oral interrogatory, but has the same untechnical <sup>meaning</sup> as our 'stipulate' = 'to provide for in the contract.'

Under these circumstances the ~~whole~~ doctrine of process-consumption, established as it now was on an entirely arbitrary basis, was bound to undergo a ~~radical~~ change.

<sup>1)</sup> As to the interpolations in period β, cp. Eisele, ZSS., 13. p.149, and Riccobono, ZSS., 35. ~~255~~ p.253.

2) *infra* p.215

<sup>3)</sup> this expression is taken from Levy, Unt., p.149.

<sup>4)</sup> also in the forms of action of the English common law.

<sup>5)</sup> and of modern systems generally.

<sup>6)</sup> see references in Levy, Unt., index sub voce 'Nachforderungsklage'



¶ The institute of process-consumption is only intelligible under what we may call an 'organic action system', that is to say, a system in which an action is regarded as a 'processual-individuum',<sup>1)</sup> having a nature and life of its own, passing through different stages of existence and capable of exercising an influence ~~xxxx~~ both on other actions and on substantive rights. This idea of the organic action was perfectly realised in the processes of the legis actio and formulary systems.<sup>2)</sup> The opposite is the conception of an action as a mere lifeless framework or mechanism for submitting substantive claims to adjudication; such were the processes of the extraordinary cognition system.<sup>3)</sup> Hence when the formulary system was abolished probably towards the end of the third century, the whole doctrine of process-consumption ought to have been abolished likewise. Naturally enough however it retained its position through force of inertia. But as there was now no such thing as litiscontestatio in the old sense, the attribution of consumptive<sup>ing</sup> efficacy to a certain stage in the proceedings, deemed to correspond to the old litiscontestatio, was purely arbitrary.

Under these circumstances the ~~whole~~ doctrine of process-consumption, established as it now was on an entirely arbitrary basis, was bound to undergo a severe attenuation in the post-classical period. Not only was there introduced a regular system of 'after-actions', granted in despite of process-consumption,<sup>4)</sup> under the classical

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<sup>1)</sup> this expression is taken from Levy, Konk., p.162.

<sup>2)</sup> also in the forms of action of the English common law.

<sup>3)</sup> and of modern systems generally.

<sup>4)</sup> see references in Levy, Konk., index sub voce 'Nachforderung' 'Nachforderungsklage'

law the grant of such an action depended entirely on equity, - but, as Justinian expressly informs us in § C.(8.40(41))28, extensive process-consumption could be excluded by simple agreement between the parties. That extensive process-consumption could be so excluded in classical times, I believe to be quite impossible; for the same was a civil law result which, if the necessary conditions were fulfilled, must take effect whatever the parties intended. The faculty of excluding extensive process-consumption by pact must therefore be attributed to the post-classical law.

Justinian by C.(8.40(41))28 of the year 531 abolished extensive process-consumption in the case both of accessorality and of correality. <sup>Paragraph</sup> § 2 of this constitution relates particularly to the latter:

Idemque in duobus reis promittendi constituimus, ex unius rei electione praeiudicium creditori adversus alium fieri non concedentes, sed remanere et ipsi creditori actiones integras et personales et hypothecarias, donec per omnia ei satisfiat.

It seems highly probable that this abolition of extensive process-consumption as between correal debtors was originally accomplished by means of a separate constitution which the revisors of the Code in 534, for the sake of brevity, combined with the similar constitution relating to fideiussors.

The words 'ex unius <sup>2</sup>rei electione' in the above quoted § 2 and the similar words in § 1 are worthy of attention. The pr. of <sup>e</sup>this constitution indeed shows plainly enough that process-consumption is referred to, and as already remarked,<sup>1)</sup> the classical jurists themselves sometimes employed 'electio' in the sense of 'election'

<sup>1)</sup> <sup>supra</sup>vide infra p. 125.

1) *supra* C.(8.40(41))28 (*supra* p. 317); D.(43)1,03 (11) *supra* p. 354; C.(6.2)22. 1d, 72, 4c; *supra* p. 125.



perfected by litiscontestatio'. Yet we are probably justified in inferring from Justinian's use of the term 'electio' here and elsewhere,<sup>1)</sup> as well as from our general knowledge of the principles of the Justinianian system, that <sup>extensive</sup> process-consumption had now come to assume in large measure a ~~class-~~ material complexion. In other words to the mind of a Justinianian lawyer litiscontestatio prior to 531 had extensive consuming effect, not ~~x~~ merely as a processual fact, but because it was deemed to indicate a material intention on the part of the creditor to exact the amount due from the one debtor and to let the other go scot-free.

Here plainly we have a complete degeneration of the original <sup>extensive</sup> conception of process-consumption, which degeneration ~~render-~~ <sup>left the</sup> ~~ed the~~ ~~existence of the~~ ~~latter~~ <sup>without any reasonable</sup> almost absurd.

mod of support.

Actually a creditor by joining issue with one of two correal debtors had no wish to let the other ~~x~~ go scot-free if he failed to extract the full amount of the debt from the one sued; moreover it was now held that the extensive consuming operation of litiscontestatio could be excluded by a previous agreement to this effect. In point of fact, from the first moment when extensive process-consumption could be excluded by pact, its doom was sealed, and the only criticism we can make on Justinian's reform is that the same was long belated.

also. C. (8.40(41))28.2 only applied in terms to passive solidary relations and here it had the importance of destroying the foundation of the classical distinction between correality and simple solidarity; in fact we may say that the Justinianian correality corresponds to the classical simple solidarity. This innovation obviously necessitated ~~a change of the classical~~ changes in those classical texts which denied the existence of a correal relation on the ground of 'inequality' or 'non-identification'

intend

1) E.g. in C. (8.40(41))23 (ut supra) p. 319; D (16.3) 1,43 (2),  
ut supra p. 253f; C. (6.2) 22.1d, 1e, 4c; Inst. IV. 1.16

while admitting the existence of a simple solidary relation. The compilers were bound, if they discharged their duty efficiently, to give the phrase 'duo rei (promittendi)' an enlarged significance covering every passive joint solidary relation, whether correal or simple according to the classical <sup>distinction</sup> system, and hence to affirm that co-debtors were duo rei in cases where the classical texts denied this. As was only to be expected, however, the compilers failed to carry out the ~~work~~ work of interpolation in a proper manner.

~~In the case of a passive correal stipulation for a determinate species,~~ when it became possible to exclude extensive process-consumption by pact we may conjecture that the practice also grew up of excluding 'extensive responsibility' by pact, for as already shown,<sup>1)</sup> extensive responsibility was in a sense the counterpart of extensive process-consumption. Accordingly, when Justinian excluded the latter by force of law, it would ~~be~~ ~~xxxx~~ a reasonable inference that the former was excluded by force of law likewise. Thus we may take it as a general principle ~~of~~ that each Justinianian correal creditor was liable in respect of his own <sup>2)</sup> culpa and mora only.

The question has been much canvassed whether Justinian's abolition of extensive process-consumption in the passive case should be applied by analogy to the active case also.<sup>3)</sup> The majority of writers are against such an application, and in fact it is perfectly clear that litiscontestatio still had an 'occupatory' force under the Justinianian law. For example in D.(45.2)2<sup>4)</sup> we read 'ideoque petitione...unius ~~xx~~ tota solvitur obligatio', which words can only apply to the active relation, though the compilers by their preceding interpolations have carelessly made them seem to apply to the passive case also. Likewise in D.(46.2)31.1,<sup>5)</sup>

<sup>3)</sup> ~~see~~  
Binder, p.423 ff.

<sup>1)</sup> ~~vide~~ <sup>technic</sup> supra p.83    2) in the <sup>technic</sup> sense described above p. 81

<sup>4)</sup> ~~vide~~ supra p.

<sup>5)</sup> ~~vide~~ supra p.



we read 'fere autem convenit... unum iudicio petentem totam rem in litem deducere'. Again in D.(46.1)5 i.f. we read 'plane si ~~alterutrumque~~ ex altera earum (sc. specierum obligationis), utramque consumet, videlicet quia natura ~~duarum~~ obligationum duarum quas haberet ea esset ut cum altera earum in iudicium deduceretur, altera consumeretur.'

The question however arises whether this possibility of one correal creditor occupying by litiscontestation can properly be regarded as process-consumption in the classical sense. In my opinion it is more likely that the Justinianian lawyers here treated occupation as a material, rather than a processual, ~~fact~~ result. The creditor who first joins issue excludes the other, not so much on the ground that the right of the other is <sup>thereby</sup> extinguished, as because the creditor who first joins issue thereby acquires a prior claim to the prestation. If it were shown that issue had been joined with no serious intention of exacting the prestation, I venture to doubt whether the Justinianian lawyers would have refused the other creditor an action. Again special cases are recorded where the rendering of satisfaction by the debtor to one party who sued first was deemed to free him from another party, though, in opposition to the class-law, mere litiscontestation was deemed to have no such effect. Such passages<sup>1)</sup> are D.(39.3)11.1:

si unus egerit, ~~quodlibet~~ [et restitutio operis litisque aestimatio facta sit] ceterorum actionem evanescere,

and D.(47.12)6:

quo cessante si alius egerit, quamvis rei publicae causa afuerit dominus, non debet ex integr<sup>o</sup> [adversus eum qui litis aestimationem sustulerit] dari.

If the view here suggested be sound, we have

<sup>1)</sup> see as to these passages Levy, Konk., p.379 n.1; 387 f; 398 f

- (1) in the case <sup>d</sup> Justinianian active correality ~~x~~ rather a concurrence of material rights than of actions, and this result seems in complete harmony with the spirit of the Justinianian law. Hence from the standpoint of the compilers, such passages as D. (45.2)16 must have had a somewhat different significance than that ~~which~~ which they bore
- (2) under the classical system. The question here raised becomes of practical importance in the case where the classical law, while excluding <sup>active</sup> correality on the ground of 'inequality' or 'non-identification', admitted a relation of active simple solidarity. If the occupatory force of litiscontest-ation now depends, not on process-consumption, but simply on a material preference accorded to the creditor who ~~xxxxx~~ ~~the~~ anticipates the other in taking the first step towards exaction of the amount due, this preference should be accorded in the case of any active solidary relation, whether correal or simple according to the classical <sup>distinction</sup> ~~system~~. But here again we seem to find a failure on the compilers' part to carry out the work of interpolation consistently; indeed in D. (45.2)15 i.f. they seem to have deliberately evaded the question of occupation altogether.
- (3)

We thus reach the result that, though C. (8.40(4)) 28.2 only applied to passive solidary relations, extensive process-consumption in the classical sense probably had, under the Justinianian system, no real place in ~~an~~ active, any more than it had in passive, solidarity. Solutio, or something which the law regarded as equivalent thereto, ~~xxxx~~ ~~occupatio~~ was the sole consuming factor in both cases, only in the active case the law still attributed an occupat-ory force to litiscontestatation.



- (1) Ulpian. D. (46.2)8.5. supra p. 58, 220.

Period  $\xi$  of this paragraph besides showing the new law of novation, also <sup>shows</sup> ~~affords a good example of a statement of solutio-consumption, where a classical jurist would certainly have referred to process-consumption.~~ <sup>as the basis of ~~solidarity~~ the solidarity relation thus established.</sup>

- (2) Ulpian. D. (45.2)3.1. supra p. 130.

Period  $\zeta$  affords an example of solutio-consumption introduced by the compilers in both the active and the passive cases, where Ulpian, I believe, dealt only with the passive case and mentioned process-consumption.

- (3) Ulpian. D. (46.1)5. supra p. 136

The compilers' action in transferring the motive 'quia natura...consumeretur' from the passive case (period  $\beta$ .) to the active case (period  $\xi$ .) is specially instructive.

Let us now endeavour to find the correct decision in the case before us from the Roman law standpoint. Solutio of  $\xi$  to either  $\beta$  or  $\gamma$  frees the debtor from the other; so much is clear. But suppose that the debtor succeeds in obtaining from  $\beta$  a transfer of the property in Stichus, and gives the same over to  $\gamma$ . Is he thereby freed from  $\beta$ ? The answer depends on how far the law has got towards realising the pure idea of 'subjective alternativity', independent of 'objective equality of prestation'. Is it willing to recognise the possibility of two obligations Titio decem dari and Caio Stichum dari standing in such a relation that fulfilment of the one

(4) Gaius D. (45.2)15. *supra* pa 163.

According to my previous conjecture, Gaius, after ~~quoting~~ quoting in <sup>β.</sup> Julian to the effect that T. and S. were not correal debtors proceeded in *β.* to explain what their actual relation was, namely, simple solidarity quoad the prestation of X. The change which the compilers should here have made was to admit that T. and S. were duo rei stipulandi, that is, <sup>st</sup>Justinianian correal creditors, and to allow either the power of occupying by litiscontestatio. The course actually adopted by them is interesting and instructive as affording an insight into their methods. They allowed the denial of correalty in *β.* to stand, <sup>but</sup> though in the first part of *β.* they ~~xxx~~ changed the denial of process-consumption to a denial of solutio-consumption. Thus we get the extraordinary result: Solutio of X to either T. or S., or solutio of Stichus to S., leaves the debtor still bound to the other, but solutio of X to either frees him from the other! The inner contradiction of these statement the compilers have sought, in an altogether futile manner, to tone down by the insertion of 'dicendum est ut'.

Let us now endeavour to find the correct decision in the case before us from the Justinianian standpoint. Solutio of X to either T. or S. frees the debtor from the other; so much is clear. But assuming that the debtor succeeds in obtaining from T. a transfer of the property in Stichus, and makes the same over to S., is he thereby freed from T.? The answer depends on how far the law has got towards realising the pure idea of 'subjective alternativity', independent of 'substantial equality of prestation'. Is it willing to recognise the possibility of two obligations Titio decem dari and Seio Stichum dari standing in such a relation that fulfilment of the one



Again, *litis contestatio* should have been accorded an occupatary force. If T. joins issue in respect of decem or S. in respect of decem aut Stichus, the right of the other should meanwhile be suspended, and will finally expire when the creditor suing actually receives satisfaction; if however the action is not duly prosecuted, the right of the other creditor may be held to revive.

If our previous conjectures regarding this fragment be sound, Julian, in the case where two smiths correally promise certain operae, on the one hand denied the possibility of a correal<sup>a</sup> relation being established, because operae are individualised by the person of him who renders them, but on the other hand he allowed such a promise to produce a relation of simple solidarity.

This being so, if the compilers' interpolations could be attributed to a desire of substituting Justinianian correality for the classical simple solidarity, they would ~~not~~ merit our entire approval. But as we have seen, there are cogent reasons for thinking that the compilers were here actuated mainly by an intention of obliterating the rule that services are essentially individualised by the person of him who renders them. The retention of the words 'eiusdem peritiae', which as they stand subject the establishment of correality to a quite impracticable condition, is in favour of the latter view; by requiring the smiths to be of the same skill, the compilers sought to tone down their elimination of the individualisation ~~xx~~ rule.

(6) Papinian. D.(45.2)9.1. infra p. 259, 274. <sup>265ff.</sup>

As will be shown in the next chapter there is every reason to believe that Papinian, while denying in period<sup>y</sup> that ~~xxxx~~ co-depositaries, a quibus inpar suscepta est obligatio were correal debtors, held their relation to be one of simple solidarity. The compilers therefore should have altered the text so as to affirm the existence of Justinianian correalty, and the fact of their having failed to do so bears eloquent testimony to the defectiveness of their methods. If the co-depositaries in the case mentioned are not duo rei, we immediately ask, what then is their relation<sup>2</sup>, and to this question no answer is forthcoming.

The first question we naturally ask is regarding the significance of the term *ἀλληλεγγύη*, *ἀλληλεγγύη* *ἐπιούρου*. This point is much disputed, but the view which most commands itself to us is as follows: The Greeks in the period of their 'naïve legal-consciousness' reached the conception of contractual solidarity through that of mutual suretyship, the same process being traceable in Germanic law where solitary actors bound themselves 'one for all and all for one'. *Ἀλληλεγγύη* is therefore simply *mutual suretyship*. The ancient Greek documents which we possess generally contain both an obligation of the *ἀλληλεγγύη* type and also a clause expressly reserving to the creditor a right of election the full debt may be paid by any one of the

<sup>1</sup> Binder, p. 23.

<sup>2</sup> Binder, l. c.

<sup>3</sup> Collinson, *op. cit.* p. 23. I. p. 23.



Justinian's famous Novel 99 of the year 529, entitled *περὶ ἀλληλεγγύων*, enacts as follows:

- (i) if two or more parties are taken bound as *ἀλληλεγγύως ὑπεύθυνοι*, but without any express provision that any one of them is liable for the whole prestation (*εἰς ὁλόκληρον*) in such case the liability shall be borne by all in equal shares;
- (ii) if it is expressly provided that any one of them is liable for the whole prestation, a *beneficium divisionis* shall be granted;
- (iii) if any proceedings are taken on the contract, the judge shall summon before him all the parties who are resident in the same locality and dispose of the case against all at the same time.

The first question we naturally ask is regarding the significance of the terms *ἀλλήλων ἔγγυοι*, *ἀλληλέγγυοι*, *ἀλληλεγγύως ὑπεύθυνοι*. This point is much disputed, but the view which most commends itself to me is as follows: The Greeks in the period of their 'naïve legal-consciousness' reached the conception of contractual solidarity through that of mutual suretyship, the same process being traceable in Germanic law where solidary debtors bound themselves 'one for all and all for one'.<sup>2)</sup> *Ἀλληλεγγύη* is therefore simply Greek solidarity.<sup>3)</sup> The oldest Greek documents which we possess indeed generally contain both an obligation of the debtors as *ἀλλήλων ἔγγυοι* (*εἰς ἕκτισιν*) and also a clause expressly conferring on the creditor a right of exacting the full debt from one and each whichever he may elect:

<sup>1)</sup> Binder, p.306.

<sup>2)</sup> Binder, l.c.

<sup>3)</sup> Collinet, *Études Historiques sur le Droit de Justinien*, I. p.139.

ἡ δὲ πρᾶξις ἔστω καὶ ἕξ ἑνὸς καὶ ἑκάστου  
(οὐδ' ὁποτέρου) καὶ ἐξ οὗ ἔαν διρῆται.

This latter clause however gradually becomes ~~r~~ rarer and by the Byzantine age it had disappeared altogether. <sup>1)</sup>

The second question we ask is, in what relation do the Greek ἀλλήλων ἔγγυοι stand to the Roman duo rei promittendi? My answer is as follows: Beyond the fact that both were solidary debtors, there was originally no relation between them whatever. Roman correality was evolved from, and always had its chief root in, the oral correal stipulation; Greek ἀλλήλεγγύη was created by a written act. The whole process of reaching solidarity through mutual suretyship implies a certain indefiniteness and fluidity of legal forms and ideas, and must be pronounced impossible under a rigid formalistic system like the ius civile. Any suggestion that two reciprocal fideiussory stipulations could ever per se constitute solidarity must, I believe, be excluded absolutely. If M. and S. were to ~~xxxx~~ attempt to bind themselves as mutui fideiussores without also binding themselves as principal debtors, such a proceeding would be absolutely futile. If they were to bind themselves as pro rata principal debtors and then each were to bind himself as fideiussor for the other, the result would not be solidarity at all, but two cumulative principal pro rata obligations each ~~xx~~ with an accessory obligation of its own. Under these circumstances I must entirely reject Collinet's view <sup>2)</sup> that Papinian in D. (45.2) ~~xxx~~ 11 pr. admitted the validity of a process of mutua fideiussio modelled after the Greek ἀλλήλεγγύη; my own

<sup>1)</sup> Mitteis, Grundzüge, I. p. 113 f.

<sup>2)</sup> op. cit. p. 131 ff. This is a perplexing point, but I

<sup>1)</sup> *supra* p. 139 ff.

<sup>2)</sup> Such a contract was known subject to the provisions of C. (5. 37(38)) 14 as regards presence in the same town.



suggestions as to ~~the question whether two or more parties~~ this pr. have ~~been~~ already been given.<sup>1)</sup>

On the other hand, ~~however~~ however, it was inevitable that correality and ἀλλήλεγγύη should be brought ~~into~~ into relation with one another after the constitutio Antonina of the year 212<sup>had</sup> extended Roman citizenship and with it Roman law to the whole empire. After that ~~event~~ event the legal position of the ἀλλήλων ἑγγυοὶ ~~as~~ as solidary debtors depended on their assimilation to the duo rei promittendi and their subjugation to the rules governing the latter. In the Eastern provinces the mere execution of a document in which two parties made a joint promise as ἀλλήλων ἑγγυοὶ no longer sufficed to create a legal correal obligation or any legal obligation at all; on the contrary a correal stipulation was now required for this purpose, though no doubt in practice the legally indispensable oral act was frequently omitted.

The Greek idea of ἀλλήλεγγύη ~~survived~~ <sup>was accorded recognition by the Justinianian law,</sup> ~~right on till the days of Justinian,~~ and, as no oral stipulation was now required, the mere execution of a document containing a joint promise by two parties as ἀλλήλων ἑγγυοὶ sufficed in itself to create a Justinianian correal obligation.<sup>2)</sup> Hence ἀλλήλεγγύη is must now be regarded simply as Greek equivalent of duo rei promittendi. The rubric of Novel 99 ~~περὶ ἀλλήλεγγύων~~ is translated in the Authenticum 'de 4 reis promittendi' ('rei promittendi' obviously meaning correal debtors), and this translation is literally correct.

The third question which we ask is, what can have induced Justinian to make ἀλλήλων ἑγγυοὶ liable only pro rata unless expressly declared to be liable singuli in solidum? This is a perplexing point, but I ~~venture~~

1) *supra* p. 139ff.

2) Such a contract was *laevon* subject to the provisions of C. (8. 37(38)) 14 as regards presence in the same town.





Chapter V. Solidarity from Real and Consensual Contracts.

Application

§ 33. ~~Extension~~ of Solidarity to Formless Negotia.

The extension of the institute of correality from the domain of obligations verbis to that of obligations re and consensu we may assume to taken place somewhere in the middle classical period, that is roughly the period from ~~kabe~~ Labeo to Julian. Prior to this extension a real or consensual obligation would for purposes of 'correalisation' have to be transformed into a verbal obligation.

The mode in which this extension was achieved is easy to understand. There was now ~~xxxx~~ admitted the possibility of a formless negotia having two or more parties on the one side or the other and endowed with a joint nature by the fact of all these parties acting communi consensu. The material community of intention is here allowed to take the place of ~~x~~ the ~~xxxx~~ formal unity of stipulation; hence where such community is present we have unity of cause just as if the different obligations had arisen from one and the same ~~xx~~ joint stipulation.

The first question that arises is concerning the antithesis solidarity v. partition. Here, I believe, we must apply the principles that an active joint contract leads naturally to partition, a passive joint contract to solidarity. The natural tendency of a passive joint contract to produce solidarity appears from ~~the manner in which~~ the jurists apply the phrase <sup>applied</sup> 'utriusque fidei in solidum secutus' or the like, ~~This phrase is applied to the creditor in a passive correal obligation.~~ This phrase connotes, inter alia, an intention to exclude partition, - to look to any one of the debtors for the rendering of the entire prestation, - and its special significance <sup>here</sup> is that, unless the terms of the contract otherwise provide, the creditor is entitled to make such

an intention effective. All this amounts to saying that solidarity pertains to the 'naturalia' of a passive joint contract, for obviously a creditor will always assert ~~such~~ an intention in favour of solidarity, in preference to partition, if he can.

A passive joint contract might, however, be so framed as to ~~produce~~<sup>in</sup> produce partition, though we can hardly regard this case as of very frequent occurrence; if partition be intended the more natural course generally is to conclude separate contracts. Like<sup>wise</sup> there is nothing to prevent an active joint contract being so framed as to produce solidarity, but here it seems more likely that a correal, stipulation would be employed in practice.

In this connection we have to draw attention to the fact that real and ~~exception~~ consensual contracts, with the exception of ~~mutuum~~ mutuum, are synallagmatic or bilateral, that is to say, they ~~produce~~<sup>in</sup> produce reciprocal obligations, the creditor in the one being debtor in the other.<sup>1)</sup> Certain of these contracts are imperfectly<sup>synallagmatic or</sup> bilateral, that is to say, originally they produce only a single perfect obligation, for example that of a depositary ~~to restore the article deposited~~ to restore the article deposited ~~though eventually there may arise a 'contrary' obligation, for example, that of a depositor to reimburse the depositary for all loss and expense incurred~~ as a result of the contract.<sup>2)</sup>

<sup>1)</sup> Hence a joint real or consensual, with the exception above mentioned, is both active and passive at the same time; for sake of convenience, however, we describe it as active or passive, according as we deal with it as the cause of obligations between two or more creditors and a single debtor, or as the cause of obligations between a single creditor and two or more debtors.

<sup>2)</sup> The nature of the 'contraria iudicia' by which such eventual obligations are sanctioned cannot be discussed here.





consensual contract ~~xx~~, over and above that of communis consensus, are simply the requisites of the particular contract under consideration ~~xxxxxxxxxxxx~~ adapted as necessary, and they therefore call for no remark.

In this connection ~~it is~~ <sup>it may</sup> however ~~to~~ be noted that all agreements made at the time of the conclusion of the contract are elements in the contract itself. Here we observe the distinction between formal and formal <sup>less</sup> negotia. In the ~~case~~ of a stipulation, all the terms of the contract must be set forth in the interrogatory otherwise they ~~cannot xxxxxxxxxx~~ cannot, on a strict application of civil law principles, be said to be part of the negotium, though the late classical jurisprudence did not adhere rigidly to this ~~xxx~~ rule? On the other hand a formless negotium is composed essentially of the entire expressed agreements of the parties at the time.

If a passive joint real or consensual contract be concluded in a manner which does not introduce any 'inequality' or 'non-identification' between the two obligations, there can be no doubt that the result is a process-consumption relation, i.e. correality, just as if the cause of obligation had been a correal stipulation. We have here to observe that the phrase 'utriusque fidem in solidum secutus' or the like, apparently connotes not merely an intention <sup>of the creditor's</sup> to exclude partition, but also, ~~where the prestation object is a determinate species,~~ an intention to hold each debtor responsible for the 'culpa' <sup>2)</sup> and mora of the other as well as for that of himself. Unless this 'extensive responsibility' is expressly excluded, it will be held to exist by virtue of an intention on the creditor's part to this effect, for naturally a creditor will always assert such an intention if he can. But extensive responsibility necessarily implies constructive unity of obligation

1) vide infra p. 244 ff.

2) in the technical sense explained supra p. 81 ; dolus is included.



~~so~~ <sup>and</sup> ~~that~~ <sup>therefore</sup> we are <sup>entitled</sup> to say ~~that~~ that, equality of prestation being assumed, this unity will result unless some element exclusive of identification is expressly introduced.

The important question now arises, what will happen if, by the terms of a passive joint contract, an inequality of prestation is introduced, or, assuming there to be no inequality, there is introduced some element exclusive of identification. We have seen that if any formal inequality or non-identification be introduced in the interrogatory of a correal stipulation, the whole act ~~is~~ is rendered null and void. But in the case of a formless negotium, of course there can be no such thing as nullity on formal grounds. What then is the result to be? is the joint real or consensual contract to be pronounced null and void on material grounds? We have ventured the conjecture that under the old civil law a correal stipulation would be rendered void on the ground of a latent defect in a correal stipulation inducing material inequality of prestation, or ~~if~~ on the ground of the prestation being materially 'individualised,' so that identification of the two obligations ~~was~~ <sup>is</sup> excluded. But can this principle be applied here? Consider for example the case of a deposit made to two parties jointly. T. has deposited a certain <sup>ai</sup> ~~an~~ article with M. and S. subject to the proviso that M. shall be liable for culpa in addition to his legal liability for dolus, while S. remains liable for dolus merely. Here we have an inequality of prestation which excludes the possibility of correality. But can we pronounce the whole deposit null and void~~?~~, that is to say, are we to refuse T. an actio depositi and leave him simply with a vindictio or condictio for the purpose of recovering his property? Such a result would be altogether anomalous. The article has actually been handed over depositionis ~~xxxxxxxxxxxxxxxx~~.

causa to ~~xxxxxxx~~ both M. and S., and T. must have an actio depositi against each. But the fact of the deposit being joint excludes the idea of cumulation~~x~~, and we are then faced with the urgent question, in what legal <sup>relation</sup> ~~capacity~~ do M. and S. actually stand?

Here I venture to think, we get at the origin of the institute of simple solidarity. M. and S. are not correal debtors ~~xxx~~ and accordingly litiscontestatio can have no extensive consuming effect, nor, we think, do the co-debtors incur extensive responsibility; yet the law <sup>must</sup> ~~regard~~ <sup>that</sup> their obligations as designed to fulfil one and the same juristic end, so that solutio by the one ~~free~~s the other. As already explained, I conjecture that the institute of simple solidarity, after having been developed within the sphere of real and consensual contracts eventually gained a footing within the sphere of verbal contract, with the result that material 'inequality' or 'non-identification' was no longer held to render a correal stipulation null and void, but merely <sup>to render</sup> ~~made~~ the same productive of obligations standing in a simple solidary, instead of a correal, relation.

It is convenient to consider in this place the result where a correal stipulation, perfectly capable in itself of producing a correal obligation, is concluded, but at the same time one or more pacts are added which, if they had been incorporated in the stipulatory formula, would have rendered a correal relation impossible. This point is suggested by the famous fragment Lecta est, Paul. D. (12.1)40, particularly by the clause 'quia pacta in continenti facta stipulationi inesse creduntur'. We see from this fragment that the late classical jurisprudence had ceased to draw a rigid line between the formal act of stipulation itself and informal agreements ancillary thereto. We therefore ask, in the case figured, do the

1) A pact made in contemplation of the fact that the stipulation is made for the purpose of defence and is not intended to be a part of the stipulation itself, but is an ancillary pact to the stipulation, and is not intended to be a part of the stipulation itself.



opinion this question must be answered in the negative. If a correal stipulation is in itself both formally and materially capable of producing a correal relation, no agreement extrinsic to the stipulatory act can prevent this result.

1) A fact <sup>made</sup> ~~made~~ subsequently could only be relied on for purposes of defence and would have to be ~~plead~~ pleaded specially by ~~the accused~~ and if an exception *pari et doli*; clearly it could not disturb a correct relation originally established.

contestation remains unimpaired, and within the limits allowed by the pact, so does the extensive responsibility of the co-debtors.

If the foregoing argument be sound, we have the result that in the case of obligations ex stipulatu a correal relation can only be reduced to one of simple solidarity through some inequality or non-identification intrinsic in the stipulation but not formally inconsistent with the joint nature of the act. This result excludes the possibility of a correal relation ex stipulatu being reduced to one of simple solidarity by virtue of a special agreement between the parties inducing inequality or non-identification; such an agreement in order to have any effect at all on the correal relation would have to be incorporated in the interrogatory and then it would render the stipulatory act formally null and void. Hence, if we wish to illustrate the reduction of correality to simple solidarity by a special agreement inducing inequality or non-identification, we must turn to the case of formless negotia where every agreement concluded at the time of the contract is part of the contract itself. The effect of a pact concluded subsequently to the conclusion of the contract will be considered in our exegesis of D. (45.2)9.)

The next question we ask is, this: In the case of <sup>less</sup> formal negotia, the parties can induce inequality or non-identification, and so reduce the resulting relation from correality to simple solidarity; can they by special agreement ~~exclude~~ directly exclude the extensive operation of process-consumption by special agreement? In my opinion this question must be answered in the negative. Process-consumption is a civil law result which cannot be excluded merely through the parties agreeing that it shall; such exclusion <sup>can</sup> ~~can~~ only be effected indirectly through the presence of some <sup>element</sup> ~~agreement~~ which prevents identification of the two obligations.

*1) infra p. 270 ff*



In order to produce a correal relation between two real or consensual contracts, unity of originating cause is as essential as in the case of obligations ex stipulatu, only the unity of originating cause here consists solely in the material fact of all parties acting with a common intention in the matter. The question, however, arises, particularly in the case of mandate, whether the law ever admitted the possibility that two separate ~~xxxxxxx~~ real or consensual contracts might produce obligations standing in a simple solidary relation. In my opinion, this question must be answered in the negative. We have already seen the reaction of the civil law against anything in the nature of solidarity without unity of <sup>originating</sup> cause,<sup>1)</sup> and the same principle ~~xx~~ must make its influence felt here also. Two obligations arising from different real or consensual contracts can only stand ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~ ~~xxxxxxx~~ in an equitable solidary relation. Further details regarding this matter may be postponed for our special discussion of the contract of mandate.<sup>2)</sup>

<sup>2)</sup> infra p. 309 ff.

<sup>1)</sup> supra p. 157 ff.

<sup>2)</sup> The position with regard to mutuum is doubtful; we have

Justinian's abolition of extensive process-consumption as between correal debtors by stipulation was naturally extended to the case of correal debtors by real and consensual contracts. This reform, as in the case of obligations ex stipulatu, broke down the classical distinction ~~between~~ between correalty and simple solidarity, and placed all solidary obligations arising from joint real or consensual contracts on a single basis of solutio-consumption; this new form of the institute we call, <sup>as before,</sup> Justinianian joint solidarity or Justinianian correalty. Accordingly the compilers, if they carried out their work of interpolation properly, should have given the expression duo rei an extended significance so as to cover classical simple solidary, as well as correal, relations, in which case they must have affirmed that co-debtors were duo rei in certain cases where the classical jurists. But here as in the case of obligations ex stipulatu, the work of interpolation was imperfectly accomplished. *The abolition of extensive responsibility accompanies that of extensive process-consumption.* The compilers seem also, in the case of mandate, to have obliterated the classical principle that a legal solidary relation could not be constituted by separate contracts. Apparently the Justinianian law here admitted a relation of several solidarity, <sup>as</sup> contrasted with the joint solidarity which resulted where unity of cause was present.

In the remainder of this chapter we shall illustrate the foregoing exposition by considering in the first place certain passages which deal with the <sup>and</sup> contracts of deposit ( ~~34~~ ), ~~the contract of~~ commodate ( ~~34~~ )<sup>2)</sup>, and the contracts of sale and hire ( § 36 ); the contract of mandate requires a special exposition ( § 37 ) which will be followed by certain illustrations ( § 38 ).

2) The position with regard to mutuum is doubtful; we have  
(cta next page)



(1) (note from previous page ctd) ~~we~~ to bear in mind that this contract though formless was essentially unilateral and was sanctioned by a *stricti iuris iudicium*. The probabilities are that a loan made to two parties jointly per se rendered each liable pro rata ~~merely~~; but could a pact be added which would render them liable *singuli in solidum*? The opening words of Paul. D. (46.1) 71: ... ~~per~~ Iulio Pollione et Iulio Rufo pecuniam mutuum accipientibus ita ut duo rei eiusdem debiti fuerint, are indecisive, for a correal stipulation may be implied; cp. Paul. D. (12.1) 2.5: 'verbis quoque credimus... veluti stipulatione.' In Diocletian C. (4.2) 12, the words 'nec re' are regarded as interpolated by Perozzi (*Kruger, Cod.*) and Riccobono (*ZSS*, 35. p. 262). Nor can much <sup>assistance be derived from</sup> ~~reliance be placed on~~ Ulpian. D. (12.1) 7. <sup>^</sup> The matter is ~~however~~ of little consequence, for if it were intended to bind the co-debtors *singuli in solidum*, a correal stipulation ~~would~~ would no doubt invariably be employed in practice. Likewise if two parties jointly made a loan, <sup>plainly</sup> ~~each~~ doubtless each was per se entitled merely pro rata, and if it were desired to constitute active solidarity, a correal stipulation would be resorted to.

It seems undesirable to complicate our present exposition with references to *fiducia* and *pignus*, and the bearing of the institute of solidarity on these contracts is therefore reserved for future studies.

share, and can reclaim this share but it alone, unless, we may add, a special agreement has been made entitling either to reclaim the whole. In the case of sequestration, on the other hand, each ~~sequestrary~~ party surrenders to the sequester the legal right of possession which he

1) *se. actio*

2) *lang. Konh.*, p. 386, cp. *Bauer*, III p. 35 ff., 'attamen'

3) My considered opinion on this point is reserved.

*Incline to the  
that solidarity  
is created by  
but*

- (1) D. (16.3)1.31. Ulpian. XXX ad edict.

Si ~~duo~~duorum servus sit qui deposuit, unicuique dominorum in partem competit depositi. <sup>1)</sup>

From this decision the conclusion is justified that if the masters made a joint deposit personally ~~instead~~ they would likewise be entitled merely pro rata, in the absence of a special agreement in favour of solidarity.

- (2) D. (16.3)17. Florentin. VII inst.

pr. [Licet deponere tam plures quam unus possunt, attamen]

apud sequestrem non nisi plures deponere possunt: nam

tum id fit cum aliqua res in controversiam deducitur.

ita<sup>que</sup> hoc casu in solidum unusquisque videtur deposuisse: quod aliter est cum rem communem plures deponunt.

- §1. Rei depositae proprietates apud deponentem manet, sed et possessio nisi apud sequestrem deposita est: nam tum demum sequester possidet: id enim agitur ea depositione ut neutrius possessioni id tempus procedat.

~~In the pr. of this fragment~~ <sup>1) if this fragment,</sup> The banal introduction <sup>2)</sup> 'licet...attamen', cannot be genuine, but, <sup>for present purposes</sup> I assume the authenticity of the remainder. <sup>3)</sup> Florentine's argument, <sup>10</sup>

<sup>it has concurred,</sup> then seems to be as follows: In the case where two or more co-owners of a thing jointly deposit the same, each remains legal owner and possessor of his own ~~share~~ share, and can reclaim this share but it alone, unless, we may add, a special agreement has been made entitling either to reclaim <sup>la</sup> the whole. In the case of sequestre, on the other hand, each ~~deponentary~~ party surrenders to the sequester the legal right of possession which he

1) sc. actio.

2) Levy, Konk., p. 386; cf. Beseler, III. p. 35 ff., 'attamen'.

3) My considered opinion on this point is reserved.



asserts over the entire thing; the sequester now becomes legal possessor of the thing, but, by virtue of the condition of the contract, he is bound to restore it to that one of the <sup>parties</sup> ~~depositors~~ who shall have succeeded in establishing the best title thereto, and if he fails so to restore it, the successful party, but he alone, can sue him (the sequester) in solidum.

The contrast between ordinary <sup>joint</sup> deposit and sequestre has a deeper significance than the contrast between partition and solidarity. Suppose in the case of an ordinary joint deposit, it is agreed that either depositor may reclaim the whole. Here we have a case of active correality; the action of the one depositor 'concurs' with the action of the other, and the concurrence is determined in the sense of process-consumption; if the one depositor joins issue in solidum with the depositary, the other's right is extinguished. On the other hand in the case of sequestre, there is no action-concurrence at all; among the several depositors, only the successful party is ~~entitled~~ entitled to sue the sequester; if an unsuccessful party attempts to do so, his action has no effect in consuming the right of the successful party. Here we see the fundamental necessity of distinguishing sequestre from ordinary joint deposit. If several disputants regarding the property in a thing were to make an ordinary joint deposit thereof 'in solidum' pending the settlement of the dispute, an unsuccessful party by joining issue with the depositary <sup>in an ordinary actio depositi</sup> would extinguish the right of the successful party, and the whole end of the deposit would be defeated. Accordingly a special formula ~~sequestraria (actio depositi sequestraria)~~, containing an

<sup>1)</sup> We assume the contract contains no element of inequality or non-identification which reduces the relation to one of simple solidarity.

~~express reference to the condition of the deposit, viz. in effect that only the successful party ~~was~~ is entitled to recover, had to be invented, so that only the successful party was entitled at all.~~<sup>1)</sup>

Accordingly there had to be devised a special <sup>institute</sup> ~~form~~ of joint deposit, called sequestre, sanctioned by a special formula sequestraria (actio depositi sequestraria) which contained an express reference to the condition of the deposit and which only the successful party was 'legitimated' to employ.<sup>1)</sup>

8. Idemque et si alter <--> dolo non fecerit, [et idcirco sit absolutus; nam ad alium pervenitur] <~>

1) see Levy, Konk., p.386 f. Lenel, Edict., p.281 f. thinks that the formula sequestraria was conceived in factum.

- 1) sed
- 2) fuerit conventus.
- 3) qui
- 4) conventus sit, alter qui dolo facit liberabitur: nam is qui convenitur alterius nomine condemnari potest.
- 5) alteri qui prior ad sententiam pervenerit res tradenda est ita ut exeat rem adversus alterum defensu iri.



(3)

D. (16.3) 1.43, 44.

§ 43

α. Si apud ~~duos~~ duos sit deposita res, adversus unumquemque eorum agi poterit, [nec] <~><sup>1)</sup> liberabitur alter si cum altero agatur [non enim electione sed solutione liberantur].

β. proinde si ambo dolo fecerunt et alter [quod interest praestiterit] <~><sup>4)</sup> alter non convenietur, exemplo duorum tutorum:

γ. [quod si alter vel nihil vel minus facere possit, ad alium pervenietur].

δ. idemque et si alter <-><sup>3)</sup> dolo non fecerit, [et idcirco sit absolutus: nam ad alium pervenietur] <~><sup>4)</sup>.

§ 44

ε. sed si duo deposuerint et ambo agant, [si quidem sic deposuerunt ut vel unus tollat totum, poterit in solidum agere: sin vero pro parte pro qua eorum interest, tunc dicendum est in partem condemnationem faciendam] <~><sup>5)</sup>

1) sed

2) fuerit conventus.

3) qui

4) conventus sit, alter qui dolo fecit liberabitur: nam is qui convenitur alterius nomine condemnari potest.

5) alteri qui prior ad sententiam pervenerit res tradenda est ita ut caveat reum adversus alterum defensu iri.

3) vide supra p. 226, § 226 f.

4) Konk., p. 210.

5) Archiv f.d. Civil. Prax., 77. p. 449.

~~These~~ These paragraphs, perplexing though they be at first sight, cause comparatively little trouble nowadays, because the interpolations are generally admitted.

In period  $\alpha$ , it is assumed that the deposit is joint, - in fact it is almost inconceivable for a deposit with two parties to be made otherwise than jointly, - and it is further assumed that there is no element of inequality or non-identification in the contract which would exclude correality. The first point decided is that the co-depositaries are liable singuli in solidum <sup>and not pro rata.</sup> (adversus unumquemque eorum agi poterit). The following denial of process-consumption and assertion of solutio-consumption are certainly due to the compilers. The 'sed' proposed by Levy<sup>1)</sup> in place of 'nec', is an almost certain restoration and much preferable to the 'et' proposed by Eisele.<sup>2)</sup> The 'non enim...liberantur' clause gives the Justinianian watchword 'non electione sed solutione', the substantive 'electio' taking the place of the processual 'litiscontestatio';<sup>3)</sup> again 'liberantur' has no proper subject.

The result of  $\alpha$ , as restored, is that joint depositaries are correal debtors in the full sense, unless of course correality is prevented by the terms of the contract, and Ulpian now proceeds to give deductions (proinde) from their correal relation.

In period  $\beta$  the reference to solutio (quod interest praestiterit) has certainly been substituted

by the compilers for a reference to litiscontestatio

3) <sup>these words are taken</sup> vide supra p. 126., §. 226 f.

4) <sup>Konk.</sup> Konk., p. 210.

2) Archiv f.d. Civil. Prax., 77.p.449.

1) Levy, Konk. p. 210 suggests *indivisa accepit*



(fuerit conventus, or the like)<sup>1)</sup>. The significance of the decision in this period is then as follows: Dolus in itself is a delict and as such it points to cumulation, not solidarity; if two persons have been guilty of a joint delict, then according to the fundamental principles of the old civil law, which ~~however~~ however were greatly modified in later times, each might be sued for the full penalty due, and neither litiscontestatio with, nor solutio by, the one had any effect on the liability of the other.<sup>2)</sup> But this rule does not apply to dolus regarded merely as a breach of contract or 'quasi-contract'.

Where the dolus 'ex contractu reiue persecutione descendit',<sup>3)</sup> it cannot have the effect of rendering correal debtors liable cumulatively. I do not, however, feel inclined to adopt Levy's suggestion<sup>4)</sup> that Ulpian wrote 'et' between 'proinde' and 'si', - 'hence even if', - as if periods  $\alpha$ . and  $\beta$ . represented a sort of climax. It is to the decision which, as we suppose, was originally contained in period  $\delta$ . , that the 'et' is really appropriate. The words 'exemplo duorum tutorum' are highly significant, for they show that co-tutors jointly administering an undivided estate were correal debtors in the full sense; this point does not however concern us here.

That period  $\gamma$ . is wholly due to the compilers may be pronounced certain. The decision is diametrically opposed to the classical process-consumption and ~~assumes~~ assumes that solutio alone has extensive consuming effect;

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<sup>1)</sup> see Levy, Privatstrafe u. Schadenersatz, (passim).

<sup>3)</sup> these words are taken from Ulpian. D. (16.3)7.1 and are pregnant with meaning; see Levy, op.cit., p.22; Konk., p. 93 ff.

<sup>4)</sup> Konk., p.210.

1) Levy. Konk. p. 210 suggests 'indictum accepit'

the phrase 'ad (aliquem) perveniri', as here used, and the change from 'alter' to 'alius(alium)' are at any rate highly suspicious.

The whole period  $\delta$ . after 'idemque' is generally attributed to the compilers, but this view seems too radical;  $\wedge$  The interpolation of the final words 'nam ad alium pervenietur' may be regarded as certain, ~~xxxxxx~~ and our attention must be concentrated on the preceding clause 'et idcirco sit absolutus'. Obviously this clause proceeds on the theory that correal depositaries are liable each for his own culpa alone, and this we believe to be contrary to the classical law; hence in our opinion the clause in question must be interpolated. I must, however, add a warning against employing the present passage as an authority for the doctrine that the classical law upheld, while the Justinianian law rejected, the extensive responsibility of correal debtors. Such an argument involves a petitio principii; it is only because we have seen good cause for maintaining this doctrine on the ground of other passages and likewise on that of general principle, that we are entitled with any certainty to pronounce the present clause 'et idcirco sit absolutus' interpolated.

As regards the restoration of period  $\delta$ ., I propose the following: Insert 'qui' between 'alter' and 'dolo', and after 'fecerit' add 'conventus est, alter qui dolo fecit liberabitur: nam is qui ~~convenitur~~'

without destroying its nature, the depositary defendant, if he wishes to make specific restitution, cannot, after otherwise than deliver the whole to one of the plaintiffs,

<sup>1)</sup> Riccobono, *Compendio in Essays in Legal History*, 1913, (ed. Vinogradoff), p. 107 (note 2(a) to p. 108). The reader should carefully note the other interpolated passages bearing on deposit cited in this work p. 102 ff.



alterius nomine condemnari potest' or the like. This restoration shows the connection between <sup>extensive</sup> process-consumption and extensive responsibility. Suppose of two correal depositaries M. and S., M. alone has been guilty of dolus, but the depositor sues  $\delta$ . According to the principle laid down in  $\delta$ . (as restored), <sup>M</sup>  $\Pi$ . is <sup>by process-consumption,</sup> necessarily freed, but this fact involves no hardship to the depositor, for S. does not gain a right to absolution merely by establishing his own innocence; on the contrary he is liable to be condemned on the ground of M.'s dolus (alterius nomine).

We now turn to the active case mentioned in § 44 (period  $\xi$ ). It is unnecessary at this time of day to spend time arguing in favour of the interpolation of the passage 'si quidem...faciendam'; its contents ~~is~~ are utterly banal, its form in the highest degree inelegant and it bears on its forefront every mark of Byzantine origin.<sup>1)</sup> As to the substance of Ulpian's original argument we can make a shrewd guess. ~~Withxxxxxxx~~ When two parties made a joint deposit without a special agreement in favour of solidarity, each was entitled pro rata merely, the basis of division being the ratio of the shares in the article held by each. Now almost certainly the words 'ambo agent' do not mean that both co-depositors bring a single joint action, but that each sues <sup>in a</sup> separately. But as presumably the object of the deposit is a determinate species which cannot be divided physically without destroying its nature, the ~~defendant~~ defendant, if he wishes to make specific restitution, cannot do ~~either~~ otherwise than deliver the whole to one of the <sup>separate</sup> plaintiffs.

1) Riccobono, Communis in Essays in Legal History, 1913, (ed. Vinogradoff), p. 107 (note 2(a) to p. 106). The reader should carefully note the other interpolated passages bearing on deposit cited in this work p. 103 ff.

tion leading  
pro rata  
division.

Which of the latter is entitled to such delivery and on what terms? Founding on Ulpian.-~~S~~ulian.D.(16.3)1.37,<sup>1)</sup>

Ulpian.D.(32)11.21 and Ulpian.D.(9.4)14 pr., I have ventured a restoration which answers this question.

The interpolation in § 44 is instructive inasmuch as it enables us to see that the compilers, following perhaps in the footsteps of previous commentators, sought to schematise the various situations. Quite probably Ulpian in the sequel to this paragraph pointed out that a special agreement entitling each of the co-depositors in solidum was perfectly competent, and this suggested the scheme: active joint deposit in solidum ~~active joint deposit in solidum~~ (si quidem sic deposuerunt ut vel unus tollat totum) - active joint deposit pro rata (sin vero pro parte pro qua eorum interest).

We shall see a more pronounced example of <sup>and</sup> ~~this~~ schematisation on the compilers' part when we come to deal with the case of joint sale, <sup>and hire</sup> ~~and~~ <sup>2)</sup>

<sup>1)</sup> cp. Riccobono, op. cit., p.105 f.

<sup>2)</sup> vide infra p. ~~294~~ 296 ff

<sup>1)</sup> si conclusum sit quod agatur, ita fieri possunt.

<sup>2)</sup> ? vide infra p. (p. 5) vide supra p.

<sup>3)</sup> si ex intervallo pactus sit

<sup>4)</sup> quare si cum altero actum fuerit, alter liberatur, quare in contextu quodam conventionis et quibus nominibus conventionis possit

<sup>5)</sup> sed

<sup>6)</sup> contrario iudicio

<sup>7)</sup> nocet



(4) D. (45.2)9. Papinian. XXVII ~~quaxxx~~ quaest.

pr. α. Eandem rem apud duos pariter deposui utriusque fidem in solidum secutus, vel eandem rem duobus similiter commodavi : fiunt duo rei promittendi,

β. quia non tantum verbis stipulationis [sed et ceteris contractibus, veluti emptione venditione, locatione, conductione, deposito, commodato, testamento ut puta si pluribus heredibus institutis testator dixit:  
'Titius et Maevius Sempronio decem dato'] <~>." 1)

§ 1 γ. Sed si quis in deponendo penes duos paciscatur ut ab altero culpa quoque praestaretur, verius est non esse duos reos a quibus impar suscepta est obligatio:

δ. <+> 2)

ε. non idem probandum est [cum duo quoque culpam promississent, si alteri postea pacto culpa remissa sit] <~> 3)

ζ. quia posterior conventio quae in alterius persona intercessit statum et naturam obligationis quae duos initio reos fecit, mutare non ~~potest~~ potest:

η. <-> 4)

θ. [quare] si socii sint [et communis culpa intercessit] <-> 5)  
etiam alteri pactum cum altero factum [proderit] <~> 6)

1) si conclusum sit quod agatur, ita fieri possunt.

2) ? vide infra p. (p. m. ε.) vide supra p.

3) si ex intervallo <sup>ita</sup> pactus sit

4) quare si cum altero actum fuerit, alter liberatur, quamvis ~~is~~ dumtaxat quocum conventum est culpa nomine condemnari possit

5) sed

6) contrario iudicio

7) nocebit

§ 2.

1. [Cum duos reos promittendi facerem ex diversis locis,  
Capuae pecuniam dari stipulatus sim, ex persona cuiusque  
ratio proprii temporis habebitur ] <~> "

K. nam et si maxime parem causam suscipiunt, nihilo minus  
in cuiusque persona propria singulorum consistit obligatio.

- 2) sed et si in continenti pactus fuerit ut ab utroque  
praestetur culpa propria ~~in~~ ipsius non etiam alterius,  
puto duos reos non esse,

- 3) I do not like the suggestion that <sup>the text</sup> ~~Capitulum~~ wrote  
'quodammodo' or 'quasi', because either of them might  
be taken to imply that the co-depositaries (co-commodat-  
aries) were not correal debtors in the full sense; cf.  
Paul. D. (26.?) 45: 'sed hanc in actionibus tractari  
quasi duo rei eiusdem debiti essent quodammodo: quod non  
ita est.' But co-depositaries (co-commodataries) were correal debtors  
in the full sense, though they were not taken bound by  
verbal contract. Levy, op. cit. p. 202 n. 2 refers to  
D. (13.6) 5.15: 'quare duo quodammodo rei habebuntur' but  
these words I believe to be interpolated (infra p. 285)  
to D. (13.6) 16 pr.: 'si duo quasi duo rei constituerimus'  
but the words 'quasi duo rei' if genuine, <sup>infra p.</sup>  
simply mean 'as correal debtors'; to D. 43.1 (31.1) 31.10:  
'si quasi plures rei fuerint venditores' but this passage  
is interpolated (infra p. 285) to D. (30) 8.1: 'quasi si  
duo promittenti rei promittendi in solidum obligati  
fuerint', but 'quasi' here means 'just as' (supra p. 1).

- 4) Levy, *op. cit.* p. 203 ~~xxxx~~ thinks the interpolation 'as  
good as certain'; see also the Italian authorities  
cited by him (p. 1).

4) l.c.

- 4) The following passages show 'duos reos promittendi' used in  
the sense of correal debtors in general: Paul. D. (2.14) 25 pr.;  
Paul. D. (3.3) 42.5; Julian D. (12.6) 20; <sup>Levy l.c. n. 10.</sup>



This fragment is one of the greatest difficulty but also of the greatest importance for the proper understanding of our subject.

In period 1. the mention of commodatum (vel... commodavi) is generally now regarded as interpolated,<sup>1)</sup> but it does not seem to me by any means impossible and I am therefore prepared to let it stand.<sup>2)</sup> Levy questions the genuineness of the statement that co-depositaries (co-commataries) become 'duo rei promittendi', and suspects that the compilers have either suppressed a 'quodammodo' or 'quasi',<sup>3)</sup> or ~~that the compilers have either suppressed a 'quodammodo' or 'quasi'~~ have inserted the 'promittendi'. He admits however the possibility of the expression 'duo rei promittendi' having been used by Papinian in a wide sense to cover correal debtors in general, and this, I think, is the sounder view. Correalty from real and consensual contracts was undoubtedly modelled after stipulatory correalty, and the extended application of the terms 'duo ~~xxx~~ rei prom.' and 'duo rei stip.' is perfectly intelligible.<sup>4)</sup>

- 3) I do not like the suggestion that Papinian wrote 'quodammodo' or 'quasi', because either of <sup>these terms</sup> them might be taken to imply that the co-depositaries (co-commataries) were not correal debtors in the full sense; cp. Paul. D. (26.7) 45: 'sed haec in magistratibus tractavi quasi duo rei eiusdem debiti essent omnimodo; quod non ita est.' But co-depositaries (co-com.) were correal debtors in the full sense, ~~though they were not taken bound by verbal contract.~~ Levy, op. cit. p. 206 n. 2 refers to D. (13.6) 5.15: 'quare duo quodammodo rei habebuntur' but these words I believe to be interpolated (infra p. 285); to D. (13.5) 16 pr.: 'si duo quasi duo rei constituerimus' but the words 'quasi duo rei' if genuine (infra p. ) simply mean 'as correal debtors'; to D. (21.1) 31.10: 'si quasi plures rei fuerunt venditores', but this passage is interpolated (infra p. 304f); to D. (30) 8.1: 'quasi si duo ~~promittendi~~ rei promittendi in solidum obligati fuissent', but 'quasi' here means 'just as' (supra p. ).
- 1) Levy, Konk., p. 205 ~~xxxx~~ thinks the interpolation 'as good as certain'; see also the Italian authorities cited by him (n. 1).

2) l. c.

4) The following passages show 'duo rei promittendi' used in the sense of correal debtors in general: Paul. D. (2.14) 25 pr.; Paul. D. (3.3) 42.5; Julian D. (12.6) 20.; <sup>see</sup> Levy, l. c., n. 10.

though  
just as if they  
had been

(they are none  
a gloss or interpolation)

The three elements in the statement of facts are  
 (i) eandem rem apud duos deposui (commodavi); (ii) pariter;  
 and (iii) utriusque fidem in solidum secutus. ~~xxxx~~ These  
 require separate attention.

(i) It is plainly inferred that the deposit, - we may omit  
 further reference to commodate, - was joint, in other words  
 that the article was delivered to both parties together  
 by way of a single contract of deposit; any other hypoth-  
 esis would be far-fetched and need not be considered.

(ii) 'Pariter', though frequently synonymous with 'simul',  
 must, as the 'inpar' in *γ*. and the 'parem' in *κ*. show, here  
 connote 'equality of prestation', 'objective equality of  
 obligation', in particular equality of liability where  
 the article is not restored at all or is restored in a  
 defective state. <sup>1)</sup> In other words, both must be liable,  
 for dolus, - this is the measure of liability which the  
 law itself will impose on a depositary in the absence of  
 special agreement, - or both must be liable for culpa also,  
 or both for casus fortuitus also, and so forth.

(iii) The phrase 'utriusque fidem in solidum secutus',  
 as we understand it, has two connotations. In the first  
 place it implies an intention of the creditor to exclude  
~~xxxxxxxxxxxx~~ partition, but this is of small import;  
 the object of the deposit is a <sup>determinate</sup> species (eandem rem) and  
 any idea that each of the co-depositaries is to be bound  
 to restore merely a part of the same may be discarded  
 altogether. Moreover, ~~xxxx~~ quite apart from the nature  
 of the thing deposited, a passive joint contract naturally  
 leads to *p* solidarity, not partition, and this tendency,  
 in the absence of any formal considerations, is bound to  
 assert itself. <sup>2)</sup> In the second place, however, - and this  
 is the important point, - the phrase in question seems to

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<sup>1)</sup> cp. Levy, Konk., p. 207.

<sup>2)</sup> cf. *supra* p.



imply an intention on the creditor's part to hold the co-depositaries 'extensively' responsible for all loss of, or damage to, the article; if the latter is not restored at all, or is not restored in a proper state, the depositor, unless the loss or damage shall have arisen through a cause for which the depositaries are not ~~responsible~~ responsible, looks to each for recovery of his full interesse, no matter which <sup>of them</sup> has actually been at fault.

We must entirely dismiss the idea, current in former times, that the phrase 'utriusque fidem in solidum secutus' implies an express agreement to create solidarity in general or correality in particular, for actually its implication is just the reverse. What Papinian <sup>in effect</sup> says is that, assuming a joint contract and equality of prestation, the creditors' intention to hold each co-depositary liable for restoring the entire article and for making good any loss caused by the dolus (culpa etc.) of the other as well as of himself, is decisive in rendering them correal debtors. Such an intention will be implied in the absence of any contrary term in the agreement, so that the position may be summed up by saying that correality belongs to the 'naturalia' of an 'equal' ~~joint~~ passive joint contract of deposit.<sup>1)</sup> These results are perfectly unexceptionable, and offer no antinomy with those arrived at in the case of correality ex ~~stipulatu~~ stipulatu. The only difference is that we are now dealing with negotia where the intentions of parties take the place of form. When we leave period~~o~~ however

1) cp. Levy, Konk., p.208, and the following passages quoted by him (note 2) in illustration of the phrase 'utriusque fidem in solidum secutus': D.(12.1)1.1: '~~aliam~~ alienam fidem secuti'; D.(17.1)21: 'alienum (utriusque) mandatum intuitus'; eod.53: 'alterutrius ~~mandatum~~ mandatum secutus'; D.(19.2)47: 'singulorum in solidum intuitum personam' (infra p.302 f.); D.(42.5)24.2: 'fidem publicam secuti'.

2) Konk., p.208 f.

3) Levy, op. cit., p.208 f.

4) Levy, op. cit., p.208 f. 'the same result' though

our troubles begin.

That period  $\beta$  in its present form cannot ~~be~~ be genuine is certain. The absence of a principal verb and the reference to 'ceteri contractus' (which include testamentum!) are in themselves sure signs of interpolation. Riccobono<sup>1)</sup> restores the text by inserting 'duo rei fieri possunt' after 'verbis stipulationis' and deleting the passage 'sed et...conductione'. Levy,<sup>2)</sup> on the other hand, deletes period  $\beta$  altogether. I venture to suggest that while Levy's proposal is too drastic,-- the initial words 'quia...stipulationis' may perfectly well be genuine,-- that of Riccobono is not drastic enough. In the first place there lurks in the words 'deposito, commodato' at any rate the suspicion of a petitio principii: co-depositaries and co-commodataries become correal debtors, because correality can be created by deposit and commodate. In the second place, the 'et' in the final 'Titius et Maevius...dato' clause is false from the classical standpoint<sup>an</sup> and must be amended to 'aut', while from the Justinianian standpoint it causes no surprise in view of C. (6.38)4 (particularly § 1a).<sup>3)</sup> In the third place the example 'ut puta si...' is altogether inelegant; having first stated that 'plures (more than two) heredes' had been instituted, the writer abruptly introduces two persons T. and M. as these heirs.<sup>4)</sup> Again it was quite ~~unnecessary~~ unnecessary to digress from the main argument in order to give an example of correality ex testamento.

For these reasons I propose to delete the

<sup>1)</sup> Dal diritto rom. class. al diritto mod. in Annali del Seminario della R. Università di Palermo, Vol. III-IV. p. 691.

<sup>2)</sup> Konk., p. 204 ff.

<sup>3)</sup> Levy, loc. cit. (p. 204 n. 4)

<sup>4)</sup> *namque* we should expect 'dixerit' rather than 'dixit', though this is a minor point.



whole of period  $\beta$  after 'stipulationis'. As to what Papinian may actually have written, I venture to refer to the clause 'tametsi quod inter eos ageretur verbis quoque stipulationis conclusum non fuisset<sup>1)</sup>' of Papinian.

D.(19.5)8, and to suggest 'si conclusum sit quod agatur ita fieri possunt'. ~~xxxxxx~~ According to this restoration period  $\beta$  signifies that, in order for co-depositaries  $\epsilon$  (co-com.) to be taken bound correally, a stipulation is not now required, as it ~~xx~~ doubtless had been at some earlier date.

The difficulties which the pr. of the fragment present are ~~xxxxxxx~~ trivial as compared with those which now meet us in § 1. In period  $\beta$  one of the co-depositaries undertakes by pact liability for culpa over and above his legal liability for dolus, and in period  $\epsilon$  both co-depositaries do this but the additional liability of one of them is subsequently remitted. This introduces the vexed questions regarding pacta adiecta in general and pacta depositioni adiecta in particular.<sup>2)</sup>

I make the following ~~xxxxxxxxxxxx~~ preliminary observations:

- (a) I believe that the classical law fully permitted a depositary to assume by pact additional liability for culpa, though it did not permit him to be relieved from liability for ~~xxx~~ dolus;<sup>3)</sup> (b) I believe that the basis of § 14 is genuine, inasmuch as Papinian did here actually deal with the case of a pactum de culpa praestanda depositioni adiectum; (c) It is certain that the original text has been fundamentally interpolated by the compilers; in particular periods  $\epsilon$  and  $\theta$  cannot have been written

<sup>1)</sup> <sup>clause</sup> which however Beseler, II.p.163 ~~xxx~~ treats as interpolated.

<sup>2)</sup> See Siber, ZSS.42.p.80 ff, where references to the leading modern authorities will be found.

<sup>3)</sup> Ulpian. D.(16.3) 1. 6, 7; cp. Paul. D.(13.6) 7 pr.

by Papinian in their present form.

Let us consider period  $\xi$ , in the first place.

The clause 'cum duo quoque culpam promississent' is impossible. 'Culpam promittere' is  $\lambda\pi\kappa\{\lambda\epsilon\gamma\acute{o}\mu\epsilon\nu\omicron\nu$  and <sup>1)</sup>crude<sup>2)</sup> 'quoque' should come after, not before, 'culpam'  $\xi$ .

~~and the conjunction of this clause with the following~~

~~'si'-clause is ~~xxxxxxxxxxxxxxxx~~ inolegant.~~ I cannot

nowever admit that the 'cum'-clause may simply be deleted,

the fact of both parties having originally assumed additional liability for culpa being thus left to implication.

On the contrary, if we pronounce this clause interpolated

we must, I believe, further attribute entirely to the

compilers the position of fact complicated in period  $\xi$ ,

namely that both depositaries originally <sup>na</sup>assumed additional liability for culpa, and that one of them, but not

the other, subsequently had this additional liability

remitted.

In the second place as regards period  $\theta$ , the

line of argument seems to be as follows: In  $\xi$  and  $\zeta$ .

it is laid down that if both the co-depositaries, say

M. and S. originally assume additional liability for

culpa, so that, their obligations being 'equal', they

are duly constituted correal debtors, in such case a

subsequent pact (hereinafter referred to as 'the pact'),

cannot disturb the correal relation originally created.

~~It is apparently thus ~~xxx~~ inferred that M. is still,~~

~~equally with S., liable ipso iure for culpa, and that, if~~

~~sued on this ground, he can only escape liability by an~~

~~equitable defence based on the pact.~~ Then in  $\theta$ , the

deduction is drawn (quare), that if M. and S. are

<sup>1)</sup> In D. (47.8)2.23 i. f. 'si in re deposita custodiam culpam quoque repromisi', 'culpam' is interpolated; Schultz, ZSS., 32. p. 36; Levy, Konk., p. 205 n. 7.

<sup>2)</sup> This is apparently the view of Levy, l. c., who holds the 'cum'-clause 'superfluous'.

~~A ~~pro~~ ~~mississent~~ should~~  
~~only count as a stipulation,~~  
~~which known then~~  
~~no word here;~~

<sup>2)</sup> if them, say M.,



*in defence* partners and S. is sued on the ground of culpa communis, he (S.) can <sup>plead the fact made with M</sup> ~~maintain the same equitable defence~~, for the obvious reason that <sup>S.</sup> ~~he~~, if condemned, will have regress against M. and the pact will thus be rendered illusory.

Thus the decision in  $\theta$  is inextricably bound up with the position of fact set ~~xxx~~ forth in  $\xi$  and must stand or fall with the latter. But we have three further grounds, the first purely formal, the second and third substantial, for refusing to attribute  $\theta$  ~~xx~~ in its present form to Papinian:

(i) Is it likely, we ask, that a classical jurist would have used the same verb 'intercessit' with two different connotations (conventio intercessit - culpa intercessit) in the same context? The inevitable negative answer at ~~one~~ once renders the clause 'et communis culpa intercessit' suspicious, for ~~xxxx~~ the genuineness of period  $\zeta$  is beyond dispute. <sup>1)</sup> Moreover the construction 'sint' (pres. subj.) - 'intercessit' (perf. indic.) governed by the same 'si' is at any rate remarkable.

(ii) We ask, on what legal principle <sup>can</sup> S., when sued on the ground of culpa, be heard to plead as follows: Yes, admittedly I have been guilty of culpa, but M. ~~is~~ who is my partner has been guilty of the same culpa, and I, if condemned, shall have regress against him in a iudicium societatis; but you have <sup>by the pact</sup> remitted M.'s liability for culpa, and my claim for regress will render the pact illusory; ergo, I must be absolved. The plaintiff's

answer is immediate: I am not concerned with any inner relation between you and M.; I am <sup>u</sup> ~~suing~~ <sup>stating</sup> you in respect

<sup>2)</sup> We shall presently see cause to believe that a period originally intervened between  $\zeta$  and  $\theta$ , but this period would have to be of considerable length in order to remove the inelegance in question.

To consider this case; hence through the articulation of  $\theta$  is sound so far as it goes, his view ~~period~~ must in our opinion be rejected.

<sup>2)</sup> We may ignore the possibility of the factually agreed ~~period~~ <sup>providing for regress even in this case</sup>

of culpa which is your own and liability for which has never been remitted. Hence we must regard <sup>1)</sup> as bad law.

(iii) The mention of culpa communis seems clearly to ~~infer~~ infer that it was only in the case of such culpa that S. would require permission to plead the pact in order to prevent it from being rendered illusory. ~~W~~ Certainly where S. is the sole culpable party~~x~~, the pact is not rendered illusory through his not being allowed to plead it; for <sup>he</sup> (S.), if condemned on the ground of his own culpa alone, cannot claim regress against M. even where they are partners. <sup>2)</sup>

But consider the converse case where M. is the sole culpable party. <sup>3)</sup> If M. and S. are partners and S. is condemned on the ground of M.'s fault, he will naturally have regress against M. in a iudicium societatis. Hence if S. is liable to be so condemned, the pact will be rendered illusory unless he can plead it, though no culpa communis has occurred.

The whole question then comes to be, can S. be condemned on the ground of M.'s culpa? Under the classical law, we believe, an affirmative answer must be given. Ex hypothesi, M. and S. are correal debtors, and as we have seen good grounds for thinking, extensive responsibility was an essential element in the passive correal relation under the classical law. Now S. (together with M.) has undertaken additional liability for culpa, and on classical principles this additional liability must be deemed to cover M.'s liability as well as his own

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<sup>1)</sup> Quaere, if the ~~xxxxxxx~~ depositor had made the pact in full knowledge of the inner relation between M. and S. and the ~~xxx~~ of the regress-rights which this relation carried with it, would equity intervene to prevent him from suing S. on the ground of culpa communis?

<sup>3)</sup> Levy, Konk., note 5(b) to p. 210 (at foot of p. 211) omits to consider this case; hence though his criticism of Binder is sound so far as it goes, his own views regarding ~~this~~ period <sup>0</sup> must in our opinion be rejected.

<sup>2)</sup> We may ignore the possibility of the partnership agreement specially providing for regress even in this case.



otherwise, according to our theory, correality would be excluded. True, M.'s liability for culpa has been remitted, but there is nothing to suggest that the pact in any way affected S.'s liability for M.'s culpa. Hence it was not only in the case of culpa communis that S. required permission to plead the pact in order to prevent it being rendered illusory; such permission was equally necessary in the case where M. alone had been guilty of culpa. In point of fact, then, period  $\beta$ . only becomes intelligible if we assume that liability for culpa was 'intensive' merely, so that S. could be condemned where the culpa was on the part of himself alone, or on the part of himself and M., but not where it was on the part of M. alone. This, as we have ~~seen~~ good grounds for believing, was actually the rule under the  $\bar{\mu}$  Justinianian law.

Now we have to ask ourselves what may have been the original purport of Papinian's argument? As at present advised, I can see only one answer to this question, namely, there were here contrasted a pact de culpa praestanda made with one of the co-depositaries at the time of the original contract and a similar pact made ex intervallo. I do ~~not~~ think it is in any way necessary to interfere with the words 'in deponendo penes duos' in <sup>2)</sup>  $\gamma$ . but I would make  $\xi$ . read 'non idem ~~pro~~ probandum est si ex intervallo ita pactus sit'.

With these restorations <sup>again</sup> § 2 1 (apart from  $\theta$ . which will be considered <sup>again</sup> presently) becomes perfectly

1) whether the remission covers liability for the culpa of both M. and S., or for the culpa of M. only or <sup>2)</sup> S. only, depends of course on the terms of the pact.

2) contra, Levy, Konk., p.295; cp. Heumann-Seckel, p.415, s.v. 'penes'. In my opinion it is hypercritical to object to 'penes' as coming in place of 'apud'. It may be observed that the sequence of tenses 'paciscatur' - 'praestaretur' does not afford any ground for objection; Kalb, Wegweiser, p.76.

$\xi$  If I considered 'in deponendo penes duos' impossible, I would substitute 'in continenti'.

explained this  
all in some  
of the context..

But, we at once ask, what is the effect of the subsequent pact? A Justinianian lawyer would no doubt answer that it is invalid for purposes of action but valid for purposes of defence.<sup>1)</sup> Under the classical law, however, it would appear that in the case of contracts sanctioned by a bonae fidei iudicium, a subsequent pact pro actore (otherwise ~~described~~ described as a pact ad augendam obligationem) was valid for purposes of action; that is to say, if the creditor sued on the

7) See the interpolations in Papinian.D. (18.1)72 pr.:  
Pacta conventa [quae postea facta detrahunt aliquid] emptioni contineri [contractui] videntur: [quae vero adiciunt, credimus non inesse]. quod locum habet in his quae adminicula sunt emptionis, veluti ne cautio duplae praestetur aut ut cum fideiessore cautio duplae praestetur. [sed quo casu agente emptore non valet pactum, idem vires habebit iure exceptionis agente ~~vendite~~ venditore] ; see Siber, ZSS., 42. p.86.



original contract the iudex was entitled and bound to take into consideration any subsequent pact by which the defendant's liability was increased. And in point of fact period J., as we understand it, implies that the subsequent pact was valid for purposes of action, otherwise there could be no question of it disturbing the original correal relation? If all this be sound, then in the case figured in ε. (as restored) and J. we have a correal relation subsisting in spite of an inequality of prestation introduced ex post facto; M. and S. are still mutually liable for dolus and litiscontestatio with the one <sup>e</sup> fre<sup>e</sup>s the other. The only difference now is that if the depositor sues S., he can only recover on the ground of dolus, <sup>of either party,</sup> whereas if he sues M., he can recover not merely on the ground of dolus of either party, but also on the ground of culpa, - whether the culpa of ~~either~~ either party or of M. alone or S. alone, depends on the terms of the pact. These results, it seems to me, are perfectly reasonable and in accordance with the spirit of the classical law. A correal relation once established is ~~always~~ always established, and ~~any~~ <sup>no</sup> subsequent modification of the liability of ~~either~~ one party <sup>can, in any case,</sup> subsequently introduced cannot detract therefrom.

subsequent

The foregoing restoration of ε. leaves <sup>6.</sup> meaningless; how could M.'s undertaking of additional liability for culpa ever 'benefit' S.? It would however be contrary to sound methods of textual criticism to assume that ~~this~~ <sup>6.</sup> period is wholly ~~due~~ due to the compilers; on the contrary we must proceed on the supposition that Papinian said something as to the effect of ~~the~~ M.'s subsequent pact on S.'s position and that the compilers adapted his words to suit their previous interpolations. The most obvious experiment is to substitute 'nocebit'

~~for~~ himself had expended (etc.), not also that which M. had expended (vide supra p. 241). We must, however, assume that S.'s expenses were a partnership debit, and that the sum repaid was

for 'proderit'. Taking the remainder of the period as it stands, the meaning would then be that, where M. and S. are partners and the depositor sues S., the latter, in the event of culpa communis being established, may be condemned by virtue of the pact; the argument in favour of this decision being that S. will have regress against M. in a iudicium societatis. Any such decision must however be rejected absolutely; S. being an entire stranger to the pact, can never be condemned by virtue thereof.

The only way in which we can fit in  $\theta$  with our other restorations apparently is to regard it as referring to the contrarium iudicium, the substitution of 'nocebit' for 'proderit' being retained. S. claims for ~~expenses~~ incurred expenses etc./in connection with the deposit; can the ~~depositor~~ depositor set-off a counter-claim for loss through ~~culpa~~ culpa for which M. is responsible under the pact? If M. and S. are partners, it seems highly equitable that such a set-off should be allowed. If the same be not allowed, the pact will be rendered illusory, because M., as S.'s partner, will share in the amount recovered by S. from the depositor, without any deduction on the ground of culpa for which he (M.) has assumed liability. Accordingly S.'s claim against the depositor must, it is thought, be reduced by the amount of the depositor's claim against M. under ~~the pact~~ the pact, S. having regress against M. in a iudicium societatis.

This interpretation of  $\theta$  involves the deletion of the 'et communis culpa intercessit' clause which we have seen to be questionable on other grounds. It also implies that Papinian wrote something <sup>(period 7.)</sup> between  $\gamma$  and  $\theta$ .  
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S., I believe, could only recover the amount which he himself had expended (etc.), not also that which M. had expended (vide supra p. 241). We must, however, assume that S.'s expenses were a partnership debit, and that the sum recovered from

(ctd fot / next page)



The following restoration of periods 47 and 48 may be suggested: quare, si cum altero actum fuerit, alter ~~liberatur~~ liberatur, quamvis is dumtaxat quocum conventum est culpa nomine condemnari possit; sed si socii sint, contrario iudicio etiam alteri pactum cum altero factum nocebit.

Another, though comparatively unimportant point of restoration is suggested by the words 'si alteri postea pacto culpa remissa sit' in §. . These words may perfectly well be genuine and possibly they originally referred ~~to the case where M. originally~~ in Papinian's text to the case where M. ~~originally~~ (but not S.) originally undertook additional liability for ~~the~~ culpa, but this additional liability was subsequently remitted. It may be that Papinian mentioned this case incidentally in the deleted period §. , and we ask how was the same likely to have been decided? On the one hand it may be argued ~~in~~ <sup>contra-</sup> ~~to~~ <sup>io</sup> from §. , that if correality were originally excluded by inequality, it could never be induced ex post facto. If this view be adopted, Papinian may have proceeded: eoque iure utimur etiam si alteri postea pacto culpa remissa sit, or the like. But on the other hand we have to remember the rule, laid down with special reference to the pactum de non petendo, that one pact could be 'elided' by another.<sup>1)</sup> If this doctrine be here applied, Papinian may have written: si autem alteri postea pacto culpa remissa sit, prius pactum per posterius elidetur, ita ut duo rei initio constituti videantur.

Assuming the substantial soundness of the

(note at foot of previous page ctd)  
and that the sum recovered by him <sup>was</sup> a partnership credit.

<sup>1)</sup> see Gai. IV. 126; Paul. Sent. I. 1. 2; Consultatio, IV. 4; Paul. D. (2. 14) 27. 2; Siber, ZSS., 42. p. 74.

foregoing restorations, we must now consider the compilers' mode of dealing with § 1.

*n.p.* // In the first place we revert to the fact that the compilers should have changed Papinian's denial of a *duo rei* relation in §. to an affirmation thereof, the classical distinction between correalty and simply solidarity being now non-existent.<sup>1)</sup> Actually the whole contrast in periods §. and §. is, from the Justinianian standpoint meaningless; for in both cases alike the relation must be one of Justinianian correalty.

*n.p.* // In the second place with regard to the manipulations of periods §. - §., we make the following observations:

*n.p.* // According to the principles of the Justinianian law a depositioni pactum pro actore/ex intervallo adiectum was invalid for purposes of action, so that obviously it could not disturb a correal relation originally established. But Papinian, as we suppose, treated such a pact as valid for purposes of action and based its incapacity for disturbing the correal relation originally established on the special ground set forth in §. Hence a revision of his decision seemed necessary.

In what manner then did the compilers carry out their revision? As we shall presently see grounds for thinking, Papinian in § 2 (period 1.) dealt with the case where both M. and S. had originally assumed additional liability for culpa, though each for his own culpa alone. The ~~mention~~ mention of this case the compilers ~~deleted~~ deleted, but here they got a cue for a suitable interpretation of § 1. Why not introduce the case where M. and S. both originally undertook additional liability for culpa, but M. subsequently had this additional liability remitted? This course would be all the more readily suggested if, as we suppose, Papinian had already

1) *vide supra* p. 248.

*stipulationem* and *König's* *Dez.*  
 simply deletes 'sim'. But all such emendations are hopeless. The compilers seem to have made a foolish attempt to copy Papinian's style up to the beginning of D(49.2) 14.25.6. (Helfferich's *Dez.* Papinian).



previously, in the ~~data~~ deleted period  $\delta$ , mentioned the case where an original undertaking of additional liability had subsequently been remitted. And so, I conjecture, the compilers utilised period  $\gamma$  as the motive for ~~an~~ a perfectly new decision; we shall presently see cause for thinking that in  $\delta$  2 they utilised period  $\kappa$  in a precisely similar manner. If all this be sound, the omission of period  $\eta$ , and the adaptation of period  $\theta$  to suit the previous interpolations ~~xxxxxxxxxxxxxx~~ with ~~difficultyxxxxxx~~ the new rule that the responsibility of correal debtors was purely 'intensive', need not cause any difficulty.

It is interesting to speculate <sup>la</sup> how Papinian would have decided the case where both M. and S. originally undertook additional liability for culpa, but M. subsequently had this additional liability remitted. Would the inequality induced ex post facto have disturbed the correal relation originally established? We think not, so that, if this answer be sound, the compilers' decision in  $\xi$  is perfectly good classical law.

We now ~~turn~~ turn to  $\delta$  2 which at first sight presents just as great difficulties as  $\delta$  1, though I believe I have found ~~xxxxxxxx~~ the key to their solution.

That period  $\iota$  was not written by Papinian in its present form, may be pronounced certain. In the first place we note the abrupt change from ~~xxxxxxxx~~ solidarity ex deposito to solidarity ex stipulatu. In the second place the construction 'cum' + imperfect subjunctive + perfect subjunctive is impossible, <sup>1)</sup> and the combination of 'duos reos <sup>a</sup>focere' and 'stipulari' (the latter being and unclassical used in the untechnical/sense of 'provide') is harsh in ~~the~~

1) Mommsen reads 'stipulatus sum' and Krüger. Dig. simply deletes 'sim', but all such emendations are hopeless. The compilers seem to have made a futile attempt to copy Papinian's style; cf. e.g. the beginning of D.(47.2) 14.25, 6. (Ulpian quoting Papinian).

the extreme. In the third place the words of the period can only refer to the case where, for example, T. at Constantinople by means of written acts takes M. and S. correally bound 'from' Rome and Carthage respectively, the place of payment being Capuae; ~~in such a case~~ <sup>are here</sup> different suspensive terms ~~being then~~ implied in favour of the respective ~~the~~ debtors. Such a ~~posit~~ position was absolutely inconceivable under the classical law, but quite practicable under the Justinianian law, as we have already seen.<sup>1)</sup>

But what did Papinian here write? To answer this question let us turn to period K, which has every appearance of being genuine. Obviously this period is meant to serve as a motive for the preceding decision that the obligations of M. and S. are subject to different implied suspensive terms. So regarded it must be construed thus: 'for though M. and S. are correal debtors, each is the subject of a separate obligatory relation', the inference being that the two relations must, if circumstances so require, be qualified differently. This construction, however, seems quite impossible. What Papinian<sup>n</sup> actually says is: 'for though M. and S. undertake precisely equal liability, & yet each is the subject of an obligation peculiar to himself',<sup>2)</sup> and to these words only one meaning can, I believe, be attached, namely, that the two obligations, though equal, are not constructively one and the same, are not correally ~~xxx~~ related.

Here, ~~xxx~~ it is thought, we get the key to the restoration of I. In the pr. of the fragment

<sup>1)</sup> supra p. 215, 224. *alterius, puto duos res non esse.*

<sup>2)</sup> cp. Papinian. D.(45,3)18.3: 'singulorum annorum initio cuiusque anni pecunia fructuario *quaeretur*<sup>t</sup>. *quaeretur*'.

Monssen ~~xxxxxxxxxxxx~~ reads 'stipulatus sum' for 's./sim', and Kruger, Dig., deletes 'sim', but all such emendations are hopeless.



the conditions necessary in order that a joint contract of deposit (or commodate) may produce correality are contained in the words 'pariter' and 'utriusque fidem in solidum secutus'. In <sup>Papinian</sup> § 1 mentions the case where correality is excluded on the ground of 'inequality': non esse duos reos a quibus inpar suscepta est obligatio. What then would be more natural that in § 2 he should proceed to deal with the case where correality is excluded because the depositor cannot be described as 'utriusque fidem in solidum secutus'? Now there are two opposites to 'utriusque fidem in solidum secutus', ~~namely~~ <sup>(a)</sup> partition and <sup>(b)</sup> solidarity without unity of obligation and hence without extensive responsibility, in other words, simple solidarity. We ~~may~~ leave partition out of account for the reasons stated above,<sup>1)</sup> and we therefore <sup>conclude</sup> that period I. as written by Papinian dealt with the case where M. and S. ~~originally~~ undertook equal liability with regard to the whole 'res', but a special agreement was made which excluded identification of the two obligations.

What then may this special agreement have been? I venture to suggest it as highly probable that <sup>here</sup> both M. and S. ~~originally~~ undertook additional liability for culpa, so that the two obligations were rendered precisely equal, <sup>(maxime pares)</sup> but that the additional liability of each was expressly restricted to his own culpa and did not cover that of the other, so that the extensive responsibility essential to a correal relation was absent. Here we have literally the situation contemplated in K., and I therefore venture to restore I. thus: Sed <sup>et</sup> si in continenti pactus fuerit ut ab utroque praestetur culpa propria ipsius, non <sup>ia</sup> etiam alterius, puto duos reos non esse.

When such an agreement as is here contemplated had been

<sup>1)</sup> ~~ex~~ supra p. 262.

made, the depositor could not be described as 'utriusque fidem in solidum secutus' within the meaning of the classical law, and hence the relation of the co-depositaries is reduced to one of simple solidarity.

Two special merits are claimed for this conjecture: (i) it gives the fragment as a whole a perfect concinnity in all respects worthy of Papinian, and (ii) it explains where the compilers got the idea of an undertaking of additional liability for culpa by both depositaries, which idea they have utilised in their interpolation of period ε.

If our restorations are in any way well founded, it is undeniable that our present fragment provides a most valuable contribution to our knowledge of the classical conceptions of correality and simple solidarity. The inscription of the fragment is significant. The twenty seventh book of Papinian's *Quaestiones* dealt largely with obligations ex stipulatu, and Lenel<sup>1)</sup> seems quite justified in giving the fragment the rubric 'de duobus reis constituendis'. In all probability the context ~~from which it is taken~~ raised certain fundamental questions regarding correality and simple solidarity, and the case of ~~deposition~~ real contracts, in particular of deposit, was introduced because of the facility with which they <sup>se</sup> lent themselves to illustrate 'inequality' and 'non-identification' in a joint contract. The formal considerations which played an all important part in solidarity ex stipulatu did not arise here, and every thing depended on what the parties had actually agreed. Again legally a depositary was liable for dolus only, but might by pact undertake additional liability, and

<sup>1)</sup> Pal. I. col. 869.



pacts of this description could easily be framed so as to produce 'inequality' or 'non-identification'.

If we assume Papinian to have written period 1. substantially as I have have restored it, the compilers could not properly leave the decision standing, because extensive liability was not an incident of the correal <sup>la</sup> ~~real~~tion under the Justinianian law. We must then in conclusion consider the question where they got their idea for the interpolation of this period. The answer to this question is, I venture to think, to be found in D.(46.1)49.2, also taken from the 27th book of Papinian's Quaestiones. In this latter paragraph Papinian discusses the following highly technical problem:

M. promises at Capua to pay T. a certain sum at X Capua; S. promises at Rome to pay the same sum at Capua as fideiussor for M. The debt being immediately due and M. being at Capua, T. is entitled to bring an action against M. at Capua immediately. But suppose T. prefers to sue S. who is at Rome by means of an 'actio arbitraria'. We ask, (i) is T. entitled to bring this action against S. at Rome immediately, or (ii) must he wait until sufficient time has elapsed to enable S. to proceed to Capua, the place of payment, should he (S.) desire to do so? Papinian decides in favour of the second alternative. If M. were at Rome, he (M.) could not be sued there in an actio arbitraria until sufficient time had elapsed to enable him to proceed to Capua, ~~mg~~ should he desire so to do, and a similar suspensive term must be implied in S's favour. The motive is expressed thus: nam e contrario quoque si quis responderit, quoniam debitor Capuae sit, fideiussorem confestim teneri non ~~hxx~~ habita ratione taciti proprii temporis, eventurum ut eo casu fideiussor conveniatur quo ~~habita~~ debitor ipse, si

Romae fuisset, non conveniretur. Founding on this decision the compilers formulate the general rule thus: itaque nobis placet fideiussoriam obligationem conditionem taciti temporis ex utriusque persona recipere tam rei promittendi quam ipsius fideiussoris....<sup>1)</sup>

Now there is a striking <sup>parallelism</sup> between the language of D.~~46.1~~ (46.1)49.2 and that of period <sup>1.</sup> of our fragment, which must be obvious to any reader, and the view which I venture to submit is that in ~~the latter~~ <sup>period 1.</sup> the compilers deliberately utilised the decision ~~in the~~ <sup>D.(46.1)49.2</sup> former as the basis of an analogous decision concerning the relation of duo rei promittendi. Under the classical law, indeed, no analogy was possible between the two cases, because a fideiussor could bind himself at a different time and place from the principal debtor, whereas the constitution of a <sup>principal</sup> correal relation ~~demanded~~ <sup>by verbal</sup> ~~the presence of all parties at the same time and place.~~ On the other hand under the Justinianian law, which permitted the creation of correality by separate <sup>acts</sup> ~~contracts~~, the analogy between the case where a principal debtor and fideiussor bind themselves at different places and that where two <sup>principal</sup> correal debtors do so, is obvious at once. It is <sup>however</sup> equally obvious that these two cases, though analogous, are not exactly parallel. A fideiussor, by virtue of his accessory position, is entitled to the benefit, not merely of any suspensive term implied in his own favour, but also to the benefit of any such term implied in favour of the principal debtor, though a principal debtor is not entitled

1) That this passage is due to the compilers seems certain; so also Pampaloni, Archivio giuridico, 55.p.512; Krüger, Dig. App. IV. With D.(46.1)49.2 African.D.(13.4)8 should be compared with D.(46.1)49.2.



to the benefit of any suspensive term implied in a fideiussor's favour. On the other hand, as two correal debtors stand on a co-ordinate/~~principal~~ footing, each can only be entitled to the benefit of a suspensive term implied in his own favour, and never to the benefit of such a term implied in favour of the other. Hence from the Justinianian standpoint, the decision in l. as it stands is perfectly unexceptionable.

To sum up, the compilers, finding that they had to delete Papinian's original decision in l., conceived the brilliant idea of substituting therefor a ~~different~~ decision in the case where two correal debtors had bound themselves 'from' different places. The motive set forth in K. seemed to them quite capable of supporting this latter decision, which ~~latter~~ could then go forth to the world bearing the imprimatur of the great Papinian. If my conjectures be sound, this fraud, which so far as I am aware has hitherto escaped detection, is laid bare at last.

quare [duo quodammodo rei habebantur et si] <~> alter  
conventus [praestiterit] liberabit  
alterum alterum, et ambobus  
competit furti actio.

D. eod. 6. Pomponius V ad Sabinum

ut alterutro agente alterius actio contra rem tollatur.

D. eod. 7. Ulpian. XXVIII ad edict.

Unde quaeritur, si alter furti operit, an ipse & solus  
debeat commodati rei conveniri.

1) quavis

2) tenent

3) ideoque

4) singulis

5) si res furtum fit, quavis sine alterutriusque culpa, singuli in solidum tenentur, sed

Romae fuisset, non conveniretur. Founding on this decision the compilers formulate the general rule thus: itaque nobis placet fideiussoriam obligationem conditionem taciti temporis ex utriusque persona recipere tam rei promittendi quam ipsius fideiussoris....<sup>1)</sup>

Now there is a striking <sup>parallelism</sup> between the language of D.~~46.1~~ (46.1)49.2 and that of period <sup>1.</sup> of our fragment, which must be obvious to any reader, and the view which I venture to submit is that in ~~the latter~~ <sup>period 1.</sup> the compilers deliberately utilised the decision ~~in the~~ <sup>D.(46.1)49.2</sup> former as the basis of an analogous decision concerning the relation of duo rei promittendi. Under the classical law, indeed, no analogy was possible between the two cases, because a fideiussor could bind himself at a different time and place from the principal debtor, whereas the constitution of a <sup>principal</sup> correal relation ~~demanded~~ <sup>by verbal</sup> ~~the presence of all parties at the same time and place.~~ On the other hand under the Justinianian law, which permitted the creation of correality by separate <sup>acts</sup> ~~contracts~~, the analogy between the case where a principal debtor and fideiussor bind themselves at different places and that where two <sup>principal</sup> correal debtors do so, is obvious at once. It is <sup>however</sup> equally obvious that these two cases, though analogous, are not exactly parallel. A fideiussor, by virtue of his accessory position, is entitled to the benefit, not merely of any suspensive term implied in his own favour, but also to the benefit of any such term implied in favour of the principal debtor, though a principal debtor is not entitled

<sup>1)</sup> That this passage is due to the compilers seems certain; so also Pampaloni, Archivio giuridico, 55, p. 512; Krüger, Dig. App. IV. With D. (46.1)49.2 African. D. (13.4)8 should be compared with D. (46.1)49.2.



§. et ait Celsus si alter conveniatur qui furti non egit et paratus sit <-><sup>1)</sup> periculo suo conveniri alterum qui furti agendo lucrum sensit ex re commodata, debere eum audiri [et absolvi] ;

§ 1 7. Sed si [legis Aquiliae adversus socium eius habuit commodator actionem] <-~><sup>2)</sup> videndum erit ne <-><sup>3)</sup> cedere debeat,

A. [si forte damnum dedit alter quod hic qui ~~xxx~~ convenitur commodati actione sarcire compellitur:

1. [nam et si adversus ipsum habuit ~~xxx~~ Aquiliae actionem commodator, aequissimum est ut commodati agendo remittat actionem,

K. [nisi forte quis dixerit agendo eum e lege Aquilia hoc minus consecuturum quam ex causa commodati consecutus est: quod videtur habere rationem.]

1) cavere

2) culpa alterius res commodata deterior facta erit, et alter eo nomine condemnatus est

3) alteri condemnato actionem quam adversus alterum habuit commodator, rescisso superiore iudicio,

Period § is without doubt largely made up of glosses and interpolations, and any attempt at restoration is little more than guess-work. Possibly Ulpian may have written: et ait duorum quidem in solidum dominium vel possessionem esse non posse, unus autem uniuscuiusque in solidum esse quamvis non omnia loca vehiculi teneat: ideoque esse verius ait singulos custodiam in totum praestare debere.

2) see Aubler in Paenagae I. Glorke, p. 257 n. 2 (separate impression, p. 21 n. 2); Levy, Romk., p. 213; Haymann, 258, 40. 2123, p. 219.

3) cf. Ulpian D(47.2) 14. 7: 'si duo sunt subrepti sunt simul'.

3) Haymann, l.c. marks 'in totum' with a point.

If by a single joint contract T. lends an article to M. and S. 'pariter' and 'utriusque fidem in solidum secutus', then without doubt, M. and S. are liable ~~enx~~ correally just as in the case of deposit. The question raised in period  $\alpha$ . of our present fragment must <sup>therefore</sup> relate to a special case which seems to be <sup>somewhat</sup> as follows: Suppose M. and S. wish to proceed, say, from one part of Rome to another and T. lets them use his carriage for this purpose. Is it reasonable in such a case to regard ~~as~~ T. as 'utriusque fidem in solidum secutus'? Should we not rather say that each of the ~~commodataries~~ commodataries has been granted the use merely of a proportionate share of the carriage and is responsible for such share alone? There can be little doubt that this question arose mainly in connection with the commodataries' responsibility for 'custodia'. A commodatary was <sup>bound</sup> ~~bound to safeguard the article lent with all possible diligence~~, and, if it were stolen, except under circumstances against which no human foresight could prevail, <sup>+</sup> he was liable. Suppose now in the case figured the carriage was stolen, should not M. and S. be held liable each for half the loss merely? This appears to be the problem set forth in  $\alpha$ . The introduction of the case of locatio (vel locatum) seems to be a gloss or interpolation, but I see no reason to interfere with 'simul'. <sup>1)</sup>

Period  $\beta$  is without doubt largely made up of glosses and interpolations, <sup>2)</sup> and any attempt at restoration is little more than guess-work. ~~ion/xxxxxxxxxxxx~~. Possibly Ulpian may have written: et ait duorum quidem in solidum dominium vel possessionem esse non posse, usum autem uniuscuiusque in solidum esse quamvis non omnia loca vehiculi teneat: ideoque esse verius ait <sup>culpam et</sup> singulos <sup>3)</sup> custodiam in totum praestare debere.

2) see Kubler in Festgabe f. Gierke, p. 257 n. 2 (separate impression, p. 21 n. 2); Levy, Konk., p. 213; Haymann, ZSS., 40. 21212, p. 219.

1) cf. Ulpian. D. (47. 2) 14. 7: 'si duo servi subrepti sint simul'.

3) ~~xxxxxxxx~~ Haymann, l.c. marks 'in totum' with a point

(continued next page)

under an absolute liability to safeguard the article lent,

in an absolute liability to safeguard the article lent,

in the emergency which was not to his own culpa,



In any event it is clear that Celsus decided in favour of solidarity as opposed to partition, and <sup>(quare)</sup> purports to give Ulpian's deductions from this result. The ~~paris~~ text, however, shows obvious signs of the compilers' hands. In the first place the reference to solutio-consumption cannot be genuine,<sup>1)</sup> but the deletion of 'si' and 'praestiterit' at once restores the classical ~~mutuum~~ process-consumption. In the second place, however, I do not believe that this restoration cures the entire defects of the passage. The clause ~~quodammodo~~ 'duo quodammodo rei habebuntur' ~~in~~ is in my opinion very questionable, and the introduction of the case of theft ~~in~~ (ambobus competit furti actio) is decidedly abrupt.

As regards the 'duo quodammodo rei habebuntur' clause, we must, if its <sup>α</sup>authenticity is to be upheld, supply 'promittendi' and understand ~~analogie~~ 'quodammodo' as connoting an analogy with correal debtors by verbal contract. But it is very doubtful whether a classical jurist would have employed such terminology; the word 'quodammodo' is certainly capable of being construed in the sense that co-commodataries were not full correal debtors, but such a construction would clearly be false.<sup>2)</sup> ~~Moreover the clause in question can quite well be dispensed with, and the ~~best~~ better~~ <sup>therefore</sup> course <sup>is the clause in question</sup> ~~probably~~ is to treat ~~it~~ as an interpolation.

To remove the abruptness of the introduction of the actio furti, I suggest that in the place now occupied by the 'duo q.r. ~~habebuntur~~ habebuntur' clause, Ulpian drew the inference that, if the article were stolen, the co-commodataries were liable singuli in

(ctd from last page) or exclamation (!), but I do not see any real objection to these words; cp. D(47.2)14.7: 'in totum'. ~~Maximamque~~ Heumann-Seckel, p.117, s.v. 'custodia' aa) understand 'vehiculum' with 'totum'.

1) 'praestiterit' has no object, and as solutio-consumption is referred to, 'conventus' is superfluous.

2) <sup>cp.</sup> vide supra p. 261 n. 3.

solidum for breach of 'custodia', even where neither of them was actually at fault. I therefore propose the following restoration of  $\gamma$ : quare si furtum fit, quamvis ~~ne~~ sine alterutriusque culpa, <sup>unusquisque eorum</sup> singuli in solidum teneantur, sed alter conventus liberabit alterum, et ambobus competit furti actio. It cannot be denied that the concinnity of the period is much improved by this restoration. The compilers may have deleted the words in italics, because in their view there could be no breach of custodia without a certain measure of fault (culpa levis).<sup>1)</sup>

The next question we naturally ~~ask~~ ask is whether the co-commodataries are entitled singuli in solidum or pro rata against the thief. Whether Ulpian here discussed this question it is impossible to say, but at any rate the decision was in favour of solidarity. As the co-commodataries were liable singuli in solidum actione commodati, they must also be entitled singuli in solidum actione furti. Ulpian did not find it necessary to state expressly the determination of the concurrence of the two actiones furti, but in fr. 6 (period  $\delta$ ) the compilers have introduced a quotation from Pomponius ~~giving~~ giving a determination in the sense of process-consumption.<sup>2)</sup> By so doing they evince their adherence to the principle that litiscontestatio had<sup>3)</sup> an occupatory effect in the case of active correality.

In period  $\epsilon$  the question is raised whether, if one of the co-commodataries, say M., has sued the thief for the full two-fold or four-fold penalty, the actio commodati must be directed against him (M.) alone, and not against the other (S.). The answer to this question is given in a quotation from Celsus which doubtless belongs to the same context as <sup>the quotation in  $\beta$ .</sup>  $\alpha$ . We have no

2) The inscription of fr 6 has been the source of some trouble, see Levy, Konk., p. 394, but with this point we are not concerned here.

1) This restoration and the grounds on which it is based are suggestions merely and must not be regarded as ~~my~~ <sup>any</sup> ~~trader~~ <sup>trader</sup> representing my considered opinion on the difficult subject of custodia-liability;  $\alpha$



difficulty in seeing Celsus's view to have been as follows:

At strict law the fact of M. having sued the thief cannot <sup>prevent</sup> ~~prevent~~ the commodator, T., from suing S. if he so pleases. If however T. sues S. and, when the proceedings are in iure, the latter makes a request that T. ~~be required to~~ sue M. instead, at the same time offering

him (T.) a promise of indemnity (with sureties if necessary) in ~~xxx~~ case he (T.) should fail to recover in full from M., in such an event, Celsus <sup>holds</sup> ~~says~~, the praetor is bound to take this request into consideration; that is <sup>in his (the praetor's) opinion</sup> to say, if T. <sup>he</sup> unreasonably rejects S.'s ~~offer~~ request and offer, the praetor must either refuse T. an action against S. altogether, or else grant the same subject to an exceptio doli or in factum which will render it nugatory.

Now this decision, eminently sound as it is, obviously proceeds on the basis that litiscontestation with M. frees S. If T., after suing M., <sup>s</sup> had recourse against S. in another actio commodati for what he failed to recover from M., the promise of indemnity becomes altogether useless; the whole end of this promise is that T., though by joining issue with M., he loses all further right of action commodati against S., may still be able to sue S. (or his sureties) in an actio ex stipulatu. Hence under the Justinianian law, extensive process-consumption being <sup>now</sup> abolished ~~entirely~~, the decision <sup>it</sup> loses ~~its whole~~ point. The compilers therefore endeavoured to adapt the same decision to the new law by two manipulations:

(i) It seems fairly clear that they deleted some such word as 'cavere' between 'paratus sit' and 'periculo'.

By means of this manipulation, which, so far as I am aware, has not previously been observed, the compilers

1) *ΚΩΔΙΚΕΥΣΙΣ ΤΗΣ ΚΩΔΙΚΕΥΣΕΩΣ ΚΑΤΑ ΤΟΥ ΕΠΙΣΤΟΛΗΣ: ΔΕ ΤΑΙΣ ΝΕ-  
ΤΕΡΑΙΣ ΚΑΝΟΝΙΣ. Ε. 54. — ΕΠΙ ΤΗΣ ΕΠΙΣΤΟΛΗΣ ΤΗΣ  
ΝΕΠΙ ΑΔΟΛΦΟΥ. ΑΡΧΗΤΗΣ. ΑΓΙΟΥ ΚΩΔΙΚΕΥΣΕΩΣ ΚΑΤΑ ΤΟΥ ΚΩΔΙΚΕΥΣΕΩΣ ΤΗΣ  
ΧΡΗΣΙΜΟΤΗΤΟΣ ΚΑΤΑ ΤΟΥ ΕΠΙΣΤΟΛΗΣ. — ΒΑΣ. ΕΚΔ. 7 (ΝΕΜΕΙΣ Ε. 13)*

eliminated the necessity of any formal promise of indemnity (with sureties if necessary) by S.; all the latter had to do was to say to T., 'sue ~~me~~ <sup>M.</sup> at my my risk'.<sup>1)</sup>

(ii) We may affirm with practical certainty that the final words of period <sup>2)</sup> 'et absolvi' were added by the compilers. These words are quite inconsistent with the classical law; under the latter, S. cannot obtain an absolatory judgment unless issue has first been joined ~~between~~ between T. and himself, and by virtue of such joinder of issue M. ~~a~~ would be freed altogether.<sup>3)</sup> Without a doubt Celsus had regard solely to proceedings in iure and to the praetor's power of refusing actions and granting exceptions. The words 'et absolvi' only become intelligible under the extraordinary cognition system where there was no distinction <sup>between</sup> ~~between~~ ius and iudicium, and where the judge might quite naturally give effect to S.'s request by pronouncing an absolatory ~~judgment~~ judgment in his favour. Such a judgment having been pronounced, T. is compelled to seek his remedy against M.; but as the action against M. is at S.'s risk, T. must be granted regress against S., should he fail to recover the full amount from M., even though S. has already been absolved.

Thus the compilers, with considerable ingenuity it must be admitted, succeeded in making Celsus's decision outwardly conformable to the new law. Still no careful enquirer could fail to perceive that the decision, even as amended, was somewhat anomalous from the Justinianian standpoint, and actually it gave considerable trouble to

<sup>2)</sup> These is nothing corresponding to these words in Bas. XIII.1.7, (Heimb. II.13).

<sup>3)</sup> *Lucy, Konk.*, p. 216.

<sup>1)</sup> ΚΙΝΔΥΝΩ ΕΜΩ ΚΙΝΗΣΟΝ ΚΑΤΑ ΤΟΥ ΕΤΕΡΟΥ; κατὰ τοῦτο i. l. t Bas. XIII. 1. 54. ~~ἐὰν δὲ ὁ μὴ κινῆσας τὴν~~ ἐὰν δὲ ὁ μὴ κινῆσας τὴν περὶ κλοπῆς... ἀγωγὴν... ἀξιολογῶν ΚΙΝΔΥΝΩ Αὐτοῦ ΚΙΝΗΣΑΙ Τὸν ΧΡΗΣΑΝΤΑ ΚΑΤΑ ΤΟΥ ΕΤΕΡΟΥ...: Bas. cod. 4 (Heimb. II. 13)



the Byzantine commentator Stephanos.<sup>1)</sup>

We now turn to § 1 of fr. 7. If period  $\eta$  could be accepted as genuine, ~~we shall consider this point presently,~~ the question submitted by Ulpian would be as follows: One of the co-commodataries, M., has injured the article lent so that the commodator, T., has an actio legis Aquiliae against him, but T. brings an actio commodati against the other co-commodatary, S., in respect of this injury. It is thus inferred that S. is liable for M.'s wrongful act and the actio commodati against him (S.) is well founded. The question is whether S., if condemned, can claim an assignment<sup>n</sup> of T.'s actio legis Aquiliae against M., with a view to working out relief?<sup>2)</sup> The answer of the classical law to this question ~~is must~~ / ~~must, I think, be~~ ~~plainly manifestly~~ that S. can claim such assignment<sup>n</sup> if he is entirely free from blame himself, but not otherwise.<sup>3)</sup>

From the compilers' standpoint, however, there arises a difficulty which is implied in period  $\theta$  : 'if perchance the other party (M.) has caused an injury which the party who is sued (S.) can be compelled to make good in an actio commodati'. That this period, which reproduces exactly the language and style of the compilers is interpolated, no one at the present day will dispute. It ~~is~~ implies that ordinarily one correal debtor ~~was~~ <sup>is</sup> not liable for the wrongful acts and neglects of another, but ~~that~~ <sup>S. must be assumed</sup> in order to render  $\eta$  intelligible, ~~we must assume that~~ <sup>3)</sup> owing to some exceptional circumstance, ~~say S. had been~~ ~~guilty of negligence in permitting M. to commit the~~ ~~wrongful act, he (S.) was here liable in an actio commodati~~ <sup>to be</sup> ~~for~~ <sup>M.'s wrongful</sup> in respect of the ~~said~~ act. If then we accept period  $\eta$  as of classical origin, we have, as Levy points out,<sup>4)</sup> a most cogent argument in favour of the view that

4) Konk., p. 212, note 5(c) to p. 210.

1) Sch. τοῦτο i. f. to Bas. XIII. 1. 5 (Heimb. II. p. 13 (33) 3) Levy, Konk., p. 216.

2) cf. *infra* p. 292 n. 2.

3) e.g. S. has been guilty of negligence in permitting M. to commit the wrongful act; cf. *infra* p. 292 f.

under the classical law correal debtors were extensively ~~responsibility~~ responsible for wrongful acts and neglects, whereas under the Justinianian law this extensive responsibility had been done away with. But whether we can actually regard period  $\eta$ . as genuine is quite another matter which we shall consider presently.

The question raised in  $\eta$ . is not answered directly, but period  $\eta$ . suggests an affirmative answer: 'for if it were against S. himself that T. had an actio legis Aquiliae, it is most equitable that in suing S. commodati he remit this actio <sup>le</sup> legis Aquiliae'. Substantially this decision is sound from the classical standpoint. There is no civil consumption relation between the delictal and penal actio legis Aquiliae and the contractual and reipersecutory actio commodati, but clearly it would be inequitable that T. <sup>h</sup> should recover damages twice over. The actual authenticity of period  $\iota$ . is however quite another matter.

Period  $\kappa$ . will be admitted by every one nowadays to be entirely the work of the compilers. In a manner ~~there~~ thoroughly characteristic of the latter and in flat contradiction to the view which has just been pronounced most equitable in  $\iota$ ., this period suggests and approves the doctrine that T., if he sues commodati does not lose his actio legis Aquiliae; all that happens is that if he subsequently brings the latter action, the sum which he has already recovered must be taken into account.

Now we must approach the question as to the genuineness of periods  $\eta$ . and  $\iota$ ..

Period  $\eta$ . presents a number of anomalies. In the first place we note the long separation of 'legis Aquiliae' and 'actionem'. It certainly looks as if the



writer had originally intended to use the genitive 'legis Aquiliae' alone, but inserted 'actionem' as an after-thought in view of the subsequent 'cedere'. Classical jurists, however, do not indulge in such ~~excessively~~ slovenly constructions. In the second place we note the phrase 'adversus socium eius', which can only mean 'against <sup>socius</sup> the ~~partner~~ of him who is sued in the actio commodati', i.e. against M. But the omission of 'qui actione commodati convenitur' after 'eius' is here quite unjustifiable; nothing has previously been said as to M. and S. being partners, - apparently 'socius' is used in a loose sense of <sup>associate in liability</sup> co-debtor; the whole position is difficult to grasp at first sight, whereas perfect perspicuity ~~ifxxxx~~ is the first watchword of every legal writer worthy of the name. In the third place, the perfect 'habuit' ~~is~~ is quite unintelligible as the period stands, the present 'habet' being obviously required.

For these reasons I have little difficulty in holding that period 7. cannot have been written by Ulpian in its present form. The key to the restoration seems to lie in the perfect 'habuit'. Let us eliminate the reference to the actio legis Aquiliae, and assume that Ulpian was dealing solely with two actions commodati against the co-commodataries, M. and S., respectively; let us further assume that the commodator T. has joined issue with S., and the question then is raised as to the right of the latter to a cession of T.'s actio commodati against M.; under these circumstances, the perfect 'habuit' becomes perfectly intelligible. The litis-contestation with S. has extinguished T.'s right of action against M., so that this latter action is now properly described as 'quam commodator habuit' ~~xxxxxxxx~~. In order that the cession in question may be effected

cf. the acute observations of Levy, Romk. p. 232 ff. with regard to the cession actionum in the case of co-tutors.

3) The formula is the same as if the question of the assignment of an actio legis Aquiliae against M. had been at stake.

the action against M. must ~~fix~~ first be revived by a praetorian ~~gr~~ grant of restitutio in integrum annulling the process-consumption. <sup>1)</sup>

Now what may have been the purport of period as written by Ulpian? I suggest the following: sed si culpa alterius res commodata deterior facta erit, et alter eo nomine condemnatus est videndum est ne alteri condemnato actionem quam adversus alterum habuit ~~remittat~~ commodator, rescisso superiore iudicio, cedere debeat. That Ulpian did actually write something like this seems to me extraordinarily probable. S. can be condemned in respect of a wrongful act or neglect of M., and the question is whether in such case S. can claim an assignment of T.'s actio commodati against M. The answer to this question must, it is thought be, that S. is entitled to such ~~assignment~~ assignment if, but only if, he is free from all blame in the matter. <sup>2)</sup>

Assuming then the substantial soundness of our restorations, let us consider in what light the case would appear to the compilers. ~~Extensive~~ Extensive process-consumption being abolished, it would seem to them anomalous to condemn <sup>S.</sup> in respect of M.'s wrongful act or neglect and grant him (S.) an assignment of T.'s actio commodati against M.; if S., on being sued, <sup>actione commodati</sup> proves that the injury complained of is attributable to M. alone, he ought to be absolved, and T. left to bring a fresh actio commodati against M. <sup>3)</sup> Extensive process-consumption and extensive responsibility go hand in hand, and with the abrogation of the former, the latter loses its raison ~~de~~ d'être. <sup>4)</sup>

But consider the following case from the

Justinianian standpoint: M. has been guilty of a wrong-

~~fact~~ <sup>1)</sup> cp. the acute observations of Levy, Konk., p. 222 ff. with regard to the cessio actionum in the case of co-tutors.

2) The principle is the same as if the question of the assignment of an actio legis Aquiliae against M. had been at stake; <sup>3)</sup> super p. 289.

3) cp. super p.



ful act rendering him liable in an actio legis Aquiliae, and S. has been guilty of negligence in permitting such an act to take place<sup>m</sup>; if T. sues S. in an actio commodati, the<sup>x</sup> latter by reason of his negligence cannot escape condemnation, but can he claim an assignment of T.'s actio legis Aquiliae against M. who is the party ~~in~~ culpable in the first degree? This seems precisely the case which the compilers have substituted in place of that figured by Ulpian and which is discussed <sup>in</sup> ~~it~~ § 1 as it stands. The same question might indeed have arisen under the classical law, though here it would apparently have caused no difficulty; if S. has contributed in any way to the wrong he has no claim to an ~~assignment~~ assignment. The Justinianian law, however, did not exclude on principle the possibility of an assignment except where the party seeking the same had been guilty of actual dolus,<sup>1)</sup> so that in the concrete case figured the question whether T.'s actio legis Aquiliae/should be assigned to S. might appear ~~unpleasant~~ somewhat delicate.

If our views regarding period  $\eta$ . be accepted, it is impossible to hold period  $\lambda$ . genuine, this latter period being obviously connected with the former. The compilers in characteristic fashion do not answer the question raised<sup>in  $\eta$ .</sup> but merely suggest<sup>in  $\lambda$ .</sup> a parallel case

the decision in which seems to have some bearing on the said question. Moreover the passage 'si adversus ipsum <sup>in  $\lambda$ .</sup> commodator' is clearly founded on the 'si legis Aquiliae...actionem' passage in  $\eta$ . ; the same 'habuit', impossible in its present context, reappearing here also; 'ipsum' in the sense of 'eum ipsum qui actione commodati convenitur' is obscure; 'aequissimum est' + 'ut' is

<sup>1)</sup> cp. Levy, Konk., p.230 ff.

ungrammatical and ἀπαξ λεγόμενον<sup>1)</sup>; the clause 'ut commodati agendo remittat actionem' is vague and slovenly, does it mean that T. can only obtain a condemnation in his actio commodati if he promises (with sureties) not to exercise his actio legis Aquiliae,<sup>2)</sup> or that T., if he sues commodati is thereby deemed to have abandoned his actio legis Aquiliae so that any subsequent request for the latter action must be refused, or what precisely does it mean?; the final 'actionem' without ~~in~~ anything definite to indicate that the actio legis Aquiliae is intended, is harsh.

little

We have therefore ~~xxxxxx~~ hesitation in pronouncing the whole of § 1 after period 7. interpolated.

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<sup>1)</sup> VIR., I. col. 296.

<sup>2)</sup> op. Ulpian. D. (6.1) 13 i. f.: unde quaeritur an non alias iudex aestimare damnum debeat quam si remittatur actio legis Aquiliae. et Labeo putat cavere petitem legem Aquilia non actum: quae sententia vera est.



~~xxx~~  
(1)

D. (19.2) 13.9. § Ulpian. XXXII ad edict.

Duo rei locationis in solidum esse possunt.

This is an example of a class of text on which no reliance whatever can be placed. It is totally irrelevant both to its preceding and to its succeeding context, and more likely than not it is insititious. Moreover its significance is quite uncertain. Does it refer to joint letters or joint hirers? If to the former, does it mean that <sup>they</sup> (the joint letters) may be solidarily bound to hand over the article or may be solidarily entitled to claim the rent? If to the latter, does it mean that <sup>they</sup> (the joint hirers) may be solidarily bound to pay the rent or may be solidarily entitled to claim delivery of the article? Hence we may dismiss this paragraph altogether.

Idem Marcellus ait non posse alterum ex dominis consequi actionem ex empto ut sibi pro parte venditor [tradat] si pro portione pretium debet:

- 1) emptoribus ~~et~~ conductoribus
- 2) venditoris aliquem ad locum aliquem
- 3) est compellendus

- 4) illius rei pars mancipanda sit totum pretium dare paratum esse
- 5) dummodo
- 6) mancipio servum det

- 4) emptorem conductorem qui petit ut haec faciat sibi fructibus in totum pretium satisfaciendum esse

(2) D. (19.2)47. Marcellus VI digest.

fr. 47 α. Cum apparebit [emptorem conductoremve] <sup>1)</sup> pluribus  
[vendentem vel locantem] <sup>2)</sup> singulorum in solidum  
intuitum personam

β. ita demum ad praestationem partis [singuli sunt  
compellendi] <sup>3)</sup> si constabit [esse omnes solvendo]  
<sup>4)</sup>

γ. quamquam [fortasse iustius sit etiam si] solvendo omnes  
erunt [electionem conveniendi quem velit non auferendam  
actori] [si] <sup>5)</sup> actiones suas adversus ceteros  
praestare non recuset.

D. (21.1)31.7, 8, 10. Ulpian. I ad edict. aed. cur.

31 § 7 δ. Marcellus quoque scribit, si servus communis servum emerit  
et sit in causa redhibitionis, unum ex dominis pro parte  
sua redhibere servum non posse: non magis, inquit, quam  
cum emptori plures heredes exstiterunt nec omnes ad  
redhibendum consentiunt.

8 ε. Idem Marcellus ait non posse alterum ex dominis consequi  
actione ex empto ut sibi pro parte venditor [tradat] <sup>6)</sup>  
si pro portione pretium <sup>a</sup>debit:

1) emptoribus ~~et~~ conductoribusve

2) vendidisse aliquem vel locasse aliquem

3) est compellendus

~~4) illi cui pars mancipanda sit totum pretium dare paratum esse~~

5) dummodo

6) mancipio servum det

4) emptorem conductoremve qui petat ut haec pars sibi  
praestetur in totum pretium satisfacere paratum esse



§ et hoc in emptoribus <-><sup>1)</sup> servari oportere ait:

7. nam venditor pignoris loco quod vendidit ~~emptor~~ retinet,  
quoad emptor <-><sup>2)</sup> satisfaciatur.

§ 10

8. Si venditori plures heredes exstiterunt, singulis pro  
portione hereditaria poterit servus redhiberi

1. et [si servus plurium venierit, idem erit dicendum:

K. [nam si unus a pluribus<sup>3)</sup> vel plures ab uno<sup>4)</sup> vel plura  
mancia ab uno emanant,<sup>5)</sup> verius <sup>est</sup> dicere;

~~xxxxxxxxxxxx~~

λ. [si quasi plures rei fuerunt venditores, singulis in  
solidum redhibendum:

μ. [si tamen partes emptae sint a singulis] recte dicetur  
alteri quidem posse redhiberi, cum altero autem agi  
quanto minoris.

ν. [item si plures singuli partes ab uno emanant, tunc pro  
parte quisque eorum experietur:

ξ. [sed si in solidum emanant, unusquisque in solidum redhibebit]

1) pluribus quorum singulorum in solidum venditor  
intuitus sit personam

~~cui pars mancipanda sit in totum pretium~~

3) sc. emant

4) sc. emant

5) <sup>c</sup> vel... emanantur, irrelevant.

2) qui petat ut pars sibi <sup>praestetur</sup> ~~mancipetur~~, in totum  
pretium

That the quotations in D.(21.1)31.7,8 come, like D.(19.2)47, from the sixth book of Marcellus's Digest, may be regarded as practically certain.<sup>1)</sup> Let us see whether by the aid of a comparison we can do something to explicate the latter fragment.

We shall consider D.(21.1)31.7,8 (periods  $\delta$ - $\eta$ . ) first. Period  $\delta$  only concerns us in so far as it shows the context of the following periods. In  $\delta$  we must, I think, substitute 'mancipio servum det' for 'tradat'. ~~Assuming~~ Assuming the object of the sale to be, as in , a slave, pro parte tradition is of course out of the question, but a mancipation may cover merely a pro indiviso share of the object. Moreover 'tradat' without a direct object is harsh, and we may assume 'servum' to have been omitted through inadvertence in the process of interpolation.<sup>2)</sup>

Period  $\zeta$  is hardly possible in its present form, and Krüger proposes to read 'in emptoris heredibus' which emendation agrees very well with Labeo-Javolen. D.(18.1)78.2. On the other hand the Basilika<sup>3)</sup> have  $\epsilon\pi\iota\ \pi\alpha\lambda\lambda\acute{\omega}\nu\ \alpha\gamma\omicron\rho\alpha\sigma\tau\acute{\omega}\nu$  and this interpretation should, I think, be adopted. My conjecture is that period  $\zeta$  originally summarised Marcellus's decision in the passage now figuring as D.(19.2)47 (periods  $\alpha$ - $\gamma$ . ) and that the compilers have deleted after 'emptoribus' ~~some such words as~~ the words 'pluribus quorum singulorum in solidum venditor intuitus sit' or the like. ~~This deletion is to be accounted for on the same grounds as the three havoc played by the compilers with D.(19.2)47, as to which point we shall speak presently.~~ I also suspect that ~~certain words have been omitted from period  $\eta$ , which period seems originally to have served as a notice and explanation of period  $\delta$ .~~ We now turn to D.(19.2)47. In period  $\alpha$  the

<sup>1)</sup> see Lenel, Pal., I., col. 200 600.

<sup>2)</sup> with D.(21.1)31.8 <sup>compare</sup> cp. Paul. eod. 57 pr.

<sup>3)</sup> XIX.10.27 (Heimb. II. p.308).

in emptoribus

for as the same related to sale,

personam,

petat ut pars  
maestetur  
in  
manipetum in  
petium



passage 'emptorem...locantem' is obviously impossible and <sup>various</sup> attempts to correct it by way of emendation <sup>have been made. 1)</sup> ~~seems hopeless.~~ Probably the introduction of locatio-  
~~conductio~~ is due to the compilers and I venture to suggest that Marcellus may have written '~~sed~~ cum <sup>conductoribusve</sup> apparebit emptoribus <sup>vel locasse</sup> pluribus vendidisse aliquem singulorum in solidum ~~intuitum~~ intuitum personam.' It seems not unlikely that he was here <sup>thinking of</sup> ~~mixing with~~ the contrast between the two cases (a) where the intentions of the parties were that each of the co-purchasers <sup>(co-hirers)</sup> should be liable to pay a proportionate share only of the price <sup>(rent)</sup> ~~(hire)~~, and (ii) (the case actually dealt with here) where the intentions of the parties were that each ~~of~~ <sup>(co-hirers)</sup> of the co-purchasers should be liable to pay the full price <sup>(rent)</sup>.

As period  $\beta$ . now stands, obviously <sup>the</sup> ~~a~~ reference is <sup>a</sup> ~~intended~~ to the beneficium divisionis, but the manner in which this reference is expressed is impossible. In the first place we note that 'partis' should, strictly speaking, be 'partium' in order to agree with the following 'singuli sunt compellendi'; this point must not, however, be pressed, for the classical jurists were not over particular in their use of the singular and plural in such connections. <sup>3)</sup> In the second place, the fact that two or ~~k~~ more parties are granted a beneficium divisionis is not correctly stated by saying that 'each is to be compelled to render a part of the prestation'. Such a mode of expression <sup>we</sup> ~~obliterates~~ the idea of a 'benefit'; what ~~we~~ should say

1) Mommsen proposes to change 'emptorem conductoremve' to ~~emptoribus venditoribusve~~ and Lenel (Pal. I. col. 600 n.4) to 'emptorum conductorumve'.

3) op. e.g. Papinian. D.(45.2)11.1: 'virilem partem singuli stipulati videbantur'.

2) apparently <sup>either</sup> between ~~either~~ co-vendors (co-letters) as regards their liability to make over the thing sold (hired) or between co-purchasers (co-<sup>hirers</sup> ~~letters~~) as regards their liability to pay the price (rent); vide infra p. 306 f.

is that 'none is to be compelled to render more than a part of the prestation'.<sup>1)</sup> ~~inter alia~~ But further, the grant of a beneficium divisionis to co-principal debtors ~~xxx~~ belongs to the Justinianian, not to the classical, law.<sup>2)</sup> ~~Following~~ What then may Marcellus have here written? Following up the conjecture that period  $\gamma$  summarises the present decision and that period  $\eta$  explains it, I venture to restore  $\beta$  thus: ita demum ad praestationem partis est compellendus (sc. venditor<sup>in locutor</sup>) si constabit emptorem qui petat ut pars sibi ~~manei~~<sup>conductor</sup> ~~petatur~~<sup>haec praestetur</sup> in totum pretium satisfacere paratum esse, or the ~~xxx~~ like.

In period  $\gamma$  the compilers in thoroughly characteristic fashion proceed to question the soundness of their preceding decision by suggesting, it as more equitable that ~~the purchaser should not be granted~~ ~~granted~~ a beneficium divisionis should not be granted but that the plaintiff should be entitled to sue any one debtor for the whole provided he assigns to such party his rights of action against the others. No argument is required that this passage could not have been written in its present form by ~~the~~ Marcellus,<sup>4)</sup> and the only question is what did the latter write? I venture to think that his original text ~~xxx~~ may have contained the words 'quamquam solvendo<sup>omnes</sup> erunt', which words gave the compilers

2) vide ~~inter~~ supra p. 34 f., 238. Collinet, Études Historiques sur le Droit de Justinien, I. p. 141 n. 3 also holds the present reference to the beneficium divisionis interpolated, though his restoration of the fragment as a whole is, in my opinion, quite impossible.

4) as to 'fortasse' see Beseler, III. p. 83 ff.; with 'iustus sit', Levy aptly compares the concluding words of Justinian. C. (7.72) ~~121~~ 10: 'quid enim iustus est...'

mk. p. 218 n. 1

1) ~~It~~, it is not grammatically possible to give period  $\beta$  this meaning by taking 'demum' to with 'partis' (a part only).

3) 'pretium' may denote 'rent' (= merces) as well as 'price'.



the cue to introduce the beneficium divisionis.

Although all the <sup>purchasers (hires)</sup> ~~debtor~~ are solvent, so that the vendor <sup>(litter)</sup> ~~creditor~~ has no reason to fear a failure to recover <sup>(rent)</sup> from each his proportionate share of the price, yet as they are liable singuli in solidum, any one must pay the full price <sup>(rent)</sup> if he wishes to claim his proportionate <sup>part</sup> share of the <sup>object</sup> thing sold <sup>(hired)</sup>. Furthermore, I venture to think that Marcellus may have added 'dummodo actiones suas adversus ceteros praestare non recuset'. As <sup>any</sup> ~~the~~ one purchaser by paying the whole price <sup>(rent)</sup> fulfils the liability of the rest as well, he is reasonable entitled to a cessio actionum.

Assuming the substantial soundness of the foregoing restorations, we now proceed to examine closely the <sup>case</sup> ~~case~~ of a sale to two persons jointly.<sup>1)</sup> The seller we shall call S. and the purchasers P1. and P2; the prestation-object we shall imagine to be a slave.

As regards the obligatio empti (i.e. the relation between the purchasers as creditors and the <sup>seller</sup> ~~vendor~~ as debtor), P1. and P2. are ipso iure entitled merely pro rata, for as we have frequently had occasion to remark an active joint contract naturally leads to partition, not solidarity. As a pro rata creditor either of them, say P1., can claim mancipation of a pro indiviso share only of the ~~x~~ slave. But if he makes this claim, is it sufficient for him to tender a corresponding part of the price or must he tender the whole? ~~Here~~ The answer to this question ~~depends~~ depends on whether the obligatio venditi (i.e. the ~~relation~~ relation between the vendor as creditor and the purchasers as debtors) is partitioned or solidary. If each purchaser is bound merely to pay a proportionate part of the price, then clearly P1. on tendering his part is entitled to mancipation of his ~~proportionate share~~

1) I think the reference to  
interpolated, but this seems  
very possible as the fragment occurs in  
Digest + with Locati + Conducti.

1) we shall not complicate our exposition by reference to the  
case of hire; the chief ~~difference~~ <sup>difference</sup> between this case and that  
of sale is that in the <sup>former</sup> ~~former~~ there can be no mancipation and  
accordingly no possibility of working out a ~~pro indiviso~~ <sup>pro indiviso</sup> share of in  
a determinate species hired. In point of fact, it would be tempting

share in the slave. Here the passive joint obligatio venditi is partitioned as well as the active joint obligatio empti; in other words the joint contract may be analysed into two separate contracts, in each of which the thing sold ~~is~~ is a separate pro indiviso share in the slave and the price is a separate part of the total value. But on the other hand, if ~~the~~ <sup>so that</sup> the purchasers are bound singuli in solidum for the price, then, though Pl. can as before claim only a pro indiviso ~~share~~ share in the slave, he must as a condition of so doing tender the full price. A little reflection will show how eminently sound this result ~~is~~ is. S. is entitled to sue Pl. for the full price, but in so doing he need only tender a pro indiviso share in the slave; ~~conversely~~ conversely, Pl. is entitled to sue S. for a pro indiviso share in the slave and that alone, but in so doing he must tender the full price. Here we have partition on the active side concurring with solidarity on the passive side, and ~~these two divergent aspects of the relation must be reconciled in the manner indicated.~~ *the result can only be as stated.*

With regard to the obligatio venditi, we now ask, when is the liability of the co-purchasers to pay the price solidary and when is it partitioned? In our opinion, if the terms of the sale contain no express provision on this point, the decision must be in favour of solidarity. A passive joint contract leads naturally to solidarity, and any doubt on the matter would seem to be settled by the words 'singulorum in solidum ~~intuitum~~ intuitum personam' in  $\alpha$ . These words, which correspond exactly to Papinian's 'utriusque fidem in solidum secutus' in D.(45.2)9 pr., indicate that the implicit intention of S. (the creditor in the obligatio venditi) is the



determinating factor in the situation, and of course his intention will always be to hold the purchasers liable solidarily if he can. Accordingly the purchasers, if they wish to be held liable merely pro rata, must make a special pact with the vendor to this effect.

Again, with regard to the obligatio empti, we ask can P1. and P2. be constituted solidary creditors so that ~~either~~ <sup>transfer</sup> ~~each~~ can claim ~~delivery~~ of the entire property in the slave? There seems no reason why such active solidarity should not be created by special pact, but we can hardly regard this case as of frequent occurrence; if ~~Rx~~ P1. and P2. wish to acquire solidary rights, they doubtless would as a rule stipulate <sup>a</sup> correally from S<sub>1</sub>, ~~and the obligatio empti being thus novated.~~

Now let us consider the converse case where two parties, S1. and S2. jointly sell a slave to a single party P. Here S1. and S2. are only entitled pro rata in the obligatio venditi, unless by special pact active solidarity is created. Such a pact cannot however have been frequent, a correal stipulation <sup>with novatory effect</sup> being no doubt preferred in practice. The case of the obligatio empti is more difficult. Though the contract is here passively joint, can P. claim from either of the ~~the~~ vendors more than his (the particular vendor's) share in the slave? unless solidarity be expressly provided for by pact? Probably not, we think; here the common property relation of the vendors seems to counteract the natural tendency of the passive joint contract to produce ~~passive~~ <sup>effectively</sup> solidarity, for obviously a co-owner cannot/dispose of more than his own share in the property. Moreover even if passive solidarity is intended, <sup>the</sup> natural course will be to employ a correal stipulation. The sounder view therefore seems to be that a sale <sup>by</sup> ~~in~~ two parties

I do so with some confidence, that the passages

It is, say, if each owner is to assume liability for the slave as of his own,

jointly produced per se partition on the passive as well as on the active side.

We thus attain the result that the passive joint obligatio venditi in a sale by one party to several was the only instance where a joint contract of sale *per se* produced a solidarity relation. In other cases solidarity, active or passive, might be induced by pact, but here a correal stipulation would be preferred. The special question dealt with by Marcellus in D.(19.2)47, - and the same question appears under another form in D.(21.1)31.8 (period § ), - arises out of the interdependence, in the case figured, of the ~~active~~ passive solidary obligatio venditi (liability of the co-purchasers to pay the price) and the/partitioned obligatio empti (right of the co-purchasers to claim the slave) which corresponds thereto.

The question whether the solidarity arising, either ipso iure or by aid of special pacts, from a joint sale, ~~present~~ is or is not of a correal nature presents no difficulty. Assuming that no 'inequality' or 'non-identification' is introduced, the joint contract is fully effective to produce the constructive unity of obligation implied in correality. If on the other hand any inequality or non-identification is introduced, only simply solidarity can result.

We must now consider the problem regarding the compilers manipulations of D.(19.2)47. Considerable light is thrown on this problem by the interpolations in ~~the~~ D.(21.1)31.10 (periods  $\theta$  - § ). I do not propose to subject this paragraph to any detailed ~~and~~ critical examination which would lead us too far afield into the realm of the aedilician remedies. I merely submit, - and I do so with some confidence, - that the passages



'si servus (1.)...a singulis( $\mu$ )' and 'item (v)...redhibebit ( $\xi$ )' are entirely due to the compilers. Assuming then the soundness of this submission, let us examine the scheme of the paragraph. All that Ulpian says is that, ( $\theta$ ) if a single vendor dies leaving co-heirs, a separate actio redhibitoria may be brought against each in proportion to his share in the inheritance, and that ( $\mu$ ) an actio redhibitoria may be brought against one co-heir and an actio quanto minoris against the other. The compilers, on the other hand, take the opportunity of introducing the matter of a joint sale, ( $\kappa$ ): (i) where the plurality of parties is on the vendor side,<sup>+</sup> and (ii) where it is on the purchaser side,<sup>o</sup> and then they attempt to work out the various results in each of the foregoing cases according as the joint sale is (a) solidary,<sup>( $\lambda$  and  $\xi$ )</sup> or (b) partitioned.<sup>( $\mu$  and  $\nu$ )</sup> This attempt may indeed be considered quite unpractical and inept, yet the fact of its having been made is highly significant; for we here see that the compilers, and perhaps certain oriental law professors before them, had been applying their minds to the question of joint bilateral contracts and had been seeking to schematise the various situations which might occur.

Now for our present purposes the important point is that, so far as we can judge, the compilers disregarded the possibility of a joint contract of sale (or a joint bilateral contract in general) producing solidarity on the one side and partition on the other. In  $\lambda$ . the vendors are 'quasi plures rei' which apparently means both that they are entitled in solidum to claim the price and that they are bound singuli in solidum to deliver the thing sold. In  $\mu$ . 'proportionate parts of the thing have been bought from the sellers respective-

in unum a pluribus  
(re. emat))

plures ab uno  
(re. emant))

*It is known, however, that the compilers were not aware of the fact that the frequent use of the Digest title "locati et conducti" (13.2) is a purchaser from several*

ly' which apparently means both ~~in~~ that each vendor is entitled to claim merely a proportionate part of the price and that each is bound to ~~in~~ deliver merely a proportionate share of the thing sold. Likewise apparently, in V., the co-purchasers are both entitled and bound pro parte, and in §. they are both entitled and bound in solidum. No reference at all is made to the case where a thing is sold by one party to several two cases are here considered (i) that of the 'emptor a pluribus' where the co-vendors are solidarily related liable singuli in solidum to pay the price, though each is entitled to claim merely a share of the thing sold. From this omission, we are lead to infer that the Justinianian lawyers had drawn up a scheme of possibilities, each case being symmetrical in the sense that the active and the passive relations harmonised as regards solidarity v. partition, and no room was left for the unsymmetrical case ~~where~~ where passive solidarity concurred with active partition.

If these observations be justified, the interpolations in D. (19.2) § 47 cease to present any serious difficulty. Marcellus, we believe, was dealing with the case where several co-purchasers were entitled merely pro rata but were bound singuli in solidum, and the compilers felt themselves bound to recast the fragment as this case did not fit in with their scheme. Now we come to their extraordinary modus operandi. ~~In α. the introduction of the case of~~

~~locatio-conductio we may ignore as a piece of Tribonianian generalisation, and our attention must be fixed on the words 'emptorem pluribus vendentem'. What do these words signify? In my opinion what the compilers meant to say can only have been 'emptorem a pluribus vel pluribus vendentem', 'a purchaser from several~~

~~It is known, somewhat remarkable that the compilers incorporated this fragment in the Digest title Locati - conducti (19.2)~~

*emptorem conductorem  
pluribus vendentem  
et locantem' in α.*



neither <sup>(litter)</sup> co-owners of the purchaser-slave can or a vendor to several', but the ~~the~~ words 'a pluribus vel' were inadvertently omitted, perhaps through the stupidity of some scribe who failed to understand the compilers' instructions. The meaning of period as it stands, now becomes plain. The words 'singulorum in solidum intuitum personam' indicate the constitution of a solidary relation, both active and passive, so that two cases are here considered (i) that of the 'emptor a pluribus' where the co-vendors are solidarily related both actively and passively, - this is the same case as is figured in period  $\lambda$ , and (ii) that of a 'vendens <sup>(locans)</sup> pluribus' where the co-purchasers are solidarily related, both actively and passively, - this is the same case as is figured in period  $\epsilon$ .

Having now given period  $\alpha$  an entirely fresh significance, the compilers proceed in  $\beta$  to ~~admit~~ <sup>grant</sup> ~~admit~~ a beneficium divisionis to the co-vendors and co-purchasers alike, ~~ad~~ and then in  $\gamma$ , they question the propriety of this admission and evince an inclination to grant a 'beneficium cedendarum actionum' ~~instead~~ <sup>merely</sup>. All this is highly important for the study of these two beneficia under the Justinianian law, but does not further concern us here.

Let us now return to ~~period~~ D.(21.1)31.  $\times$  8. If my conjecture be sound that after 'emptoribus' in  $\gamma$ .

Ulpian wrote 'pluribus quorum singulorum in solidum venditor intuitus sit personam', so that we have here a summary of Marcellus's decision in  $\times$  D.(19.2)47  $\times$  (as restored), all serious difficulty is removed. In the preceding period  $\xi$  which deals not with a ~~joint~~ <sup>joint</sup> sale to two parties, but with a simplex sale to a slave owned in common, Marcellus, as quoted by Ulpian, holds that ~~neither~~

partial

neither of the co-owners of the purchaser-slave can claim pro parte mancipation merely by tendering a part of the price. This decision the compilers left untouched, except for the alteration of mancipation to tradition. The sale is here simplex, not joint, in form, and no question ~~is raised~~ <sup>is raised</sup> as to the solidary or pro rata liability of the co-owners (quod iussu etc.). The seller is <sup>then</sup> ~~on principle~~ <sup>on principle</sup> entitled to retain the slave until he receives the full price, just as if the purchaser had been a single freeman; cp. Ulpian. D. (19.1) 13.8.

In period J, on the other hand, Ulpian, still quoting from Marcellus, turns to the case of a joint sale to several purchasers, and here the ~~mak~~ vendor is not entitled to demand the full price in return for a pro rata mancipation, except where the purchasers are liable for the price singuli in solidum. ~~Here then we~~ have the case of active partition concurring with passive solidarity, for which there was no room in the compilers' scheme. Under these circumstances the step which the latter took is illustrative of their methods in general. In periods J. and  $\eta$ . they simply deleted all reference to the solidarity of the co-purchasers liability and its ~~concurrence~~ concurrence with the partition of their right. Thus period  $\eta$ . was reduced to a state of complete vagueness and the special point of period J. as a motive ~~for~~ and explanation of, period  $\eta$ . was eliminated.

to purchase for him the same fundus Cornelianus. That relation is here created between M. and S. The lack of common consensus between M. and S., - in other words the absence then of unity of originating cause, - plainly excludes the idea of correality. But it is equally plain that if either M. or S. effects the purchase, T. can have no further claim against the other. The question then

then known this  
condition is fulfilled,



For purposes of exposition we must consider separately the cases of A. a plurality of mandataries, and B. a plurality of mandators.

#### A. Plurality of Mandataries.

§ 1. *Obligatio directa.* If a single mandate is imparted by the mandator T. to two mandataries, M. and S., jointly, then as a passive joint contract leads naturally to solidarity, not partition, M. and S. will be liable *singuli in solidum* unless ~~partition~~ *pro rata* liability is expressly provided for. The solidarity will be correal if there is no inequality or non-identification between the two obligations, otherwise it will be simple. The jointness of a mandate depends on the material fact of M. and S. having each undertaken to act in conjunction with the other; there must be *communis consensus* on the part of the mandataries. Suppose for example that a mandate is given by T. to M. alone, and subsequently it is desired to associate S. with M.; in order that M. and S. may be joint mandataries, each must agree to act with the other, so that the original simplex contract of T. with M. is in effect superseded by a fresh joint contract with M. and S.

Under certain circumstances, however, it is quite possible for independent mandates having one and the same end to be given to different parties. For example, T. may give M. and S. each a separate mandate to purchase for him the same fundus Cornelianus. What relation is here created between M. and S.? The lack of *communis consensus* between M. and S.,—in other words the absence ~~then~~ of unity of originating cause,—plainly excludes the idea of correality. But it is equally plain that if either M. or S. effects the purchase, T. can have no further claim against the other. The question then

arises, have we here a real case of simple solidarity. Suppose neither M. nor S. fulfils the mandate, then if one of the mandataries pays the mandator's full interesse, is the other ipso iure freed? If so, the relation is one of ~~simple~~ simple solidarity; if not, then it is one of legal cumulation and ~~equity~~ the aid of equity must be invoked in order to prevent ~~the~~ the mandator from exacting double damages. In my opinion, the decision must be in favour of legal cumulation; even in the case of the formless negotia the reaction of the civil law against solidarity without unity of cause ~~must~~ <sup>effective</sup> make its influence ~~felt~~. The fact that specific fulfilment of ~~the mandate~~ by the one mandatarary frees the other may easily be accounted for on the ground that the two mandates by their nature cannot both be fulfilled. It is only in the event of non-fulfilment of either mandate that the legal cumulation can operate.

The position may be summed up by saying that only in equity is the identity of juristic end recognised; the law itself refuses to take this identity into account where unity of originating <sup>cause</sup> is lacking. It is, however, to be observed that the resort to equity in order to prevent the mandator from exacting double damages does not imply any necessity of the praetor's intervention, for the iudex in a bonae fidei iudicium can give effect to equitable defences without the aid of an exception.

The question above raised becomes practical ~~in~~ when we consider the matter of ~~a~~ cessio actionum. If M. and S. be solidary debtors, then solutio by one, say ~~cessio to M. or S. is sufficient, so that no subsequent~~ cessio to M. or S. is right

2. Obligatio contraria. The right of M. and S. to ~~recover~~ recover all expenses loss etc. incurred through the ~~mandate~~



M., frees the other, S., <sup>6</sup>absolutely, so that no subsequent cession to M. of T.'s right of action against S. is legally possible. A cession in return for a payment is therefore only possible on the fiction of a sale, the cession being agreed upon ~~before~~ <sup>when</sup> the payment is actually made. All this is explained in a passage which, though it refers immediately to the correal relation of co-tutors, is equally relevant here, for solutio-consumption operates alike both in correalty and in simple solidarity:

D. (46.3) 76. Modestinus respondit, si post solutum sine ullo pacto omne <sup>6</sup>quod ex causa tutelae debeatur, actiones post aliquod intervallum cessae sint, nihil ea cessione actum cum nulla actio superfuerit: quod <sup>si</sup> ~~si~~ <sup>ante solutionem hoc factum est vel</sup> cum <sup>conven-</sup> ~~conven-~~ isset ut mandarentur actiones, tunc solutio facta esset <sup>[mandatum subsecutum ~~est~~ est]</sup> ~~et~~ salvas esse mandatas actiones, cum <sup>[novissimo quoque]</sup> ~~hoc~~ casu pretium <sup>[magis]</sup> mandatarum ~~et~~ actionum solutum <sup>[quam actio quae fuit perempta]</sup> videatur.

2. Obligatio contraria. If ~~ex~~ a single joint mandate be given On the other hand if simple solidarity is excluded payment ~~et~~ by M. does not free S., so that cession to M. of T.'s right of action against S. remains fully competent and can be claimed in order to ~~et~~ enable M. to work out proportionate regress against S. Equity, however, will prevent T., after he has recovered in full from, or ~~et~~ <sup>probably</sup> ~~et~~ after he has merely joined issue with, M. from bringing a further action himself against S.

2. Obligatio contraria. The right of M. and S. to ~~et~~ <sup>and</sup> recover all expenses loss ~~et~~ incurred through the ~~et~~

execution of the mandate causes no difficulty. Whether a single mandate be imparted to M. and S. jointly, or separate mandates be imparted to them severally, each can only claim payment of the expenses, <sup>etc.</sup> ~~less etc.~~ which he himself has incurred, unless in the case of a joint mandate active solidarity be expressly created by pact. In the latter event however a correal stipulation would be the more natural course.

#### B. Plurality of Mandators.

1. *Obligatio directa.* Two parties M. and S. may give a single joint mandate to T., or they may give separate mandates directed to one and the same end. But in both cases alike, the claim of either M. or S. against T. can only cover his (the particular mandator's) interest, unless ~~x~~ in the case of a joint mandate solidarity be expressly created by pact. In the latter event however the parties would <sup>more</sup> naturally have resort to a correal stipulation.

2. *Obligatio contraria.* If ~~xx~~ a single joint mandate be given by M. and S. to T., then as a passive joint contract naturally leads to solidarity, not partition, M. and S. will be liable <sup>singuli in solidum</sup> ~~separately~~ to reimburse T. for all expenses, ~~less~~ etc. incurred through execution of the mandate, unless ~~partition~~ pro rata liability be expressly provided for. As usual, solidarity will be correal where there is no inequality or non-identification between the two obligations, otherwise it will be simple.

Where separate mandates directed to one and the same end are given by M. and S. to T., the question again arises whether the relation of M. and S. is one of

1. *Papinian, D(27.7)7, Justinian C(4.18)3; Leg. 11, p. 106.*



(1) simple solidarity or of legal cumulation ~~reduced to~~  
~~equity~~ which only by aid of  
 equity is reduced to solidarity. As in the case of a  
 plurality of mandataries, I take the ~~xx~~ latter view.  
 If T., having obtained his full interesse from, say, M.,  
 or even having joined ~~x~~ issue with M. ~~for~~, subsequently  
 sues S., the bonae fidei officium of the iudex will  
 indeed suffice to ~~prevent~~ protect S. without the aid of  
 any exception, but M., ~~if he makes~~ even after having made  
 payment, is entitled to demand a ~~restitution~~ of T.'s  
 right of action against S. in order to work out propor-  
 tionate relief.

As is well known mandate was extensively  
 employed in later classical times for purposes of  
 suretyship, and this aspect of the contract will be  
 discussed fully in our future study on Accessoriality.

Justinian in his constitution C.(8.40(41))28 pr.  
 of 531, expressly mentions the abolition of extensive  
 process-consumption as between co-mandatores, though  
 whether a separate enactment to this effect had been  
 made prior to ~~531~~ 531 remains uncertain. Naturally the  
 abolition of extensive process-consumption must be  
 applied to all cases of passive correality ex mandato.

The Justinianian lawyers seem further to have  
 obliterated all distinction between a joint mandate  
 and several mandates directed to the same end, solutio-  
 consumption being allowed to operate extensively in the  
 case of the latter as well as in that of the former.

- 1). Papinian. D(27.7)7; Justinian C.(4.18)3; Levy, Sponsio,  
 p. 146.

It is important,  
 however, to observe  
 that co-mandatores  
 who were naturally  
 the parties of co-  
 munities enjoyed a  
 beneficium divisionis  
 under Hadrian's rescript,<sup>1)</sup>  
 though apparently it  
 was only in this case  
 that such a beneficium  
 was accorded to  
 co-mandatores under the  
 classical law.

(1)

D.(17.1)60.2. Scaevola I respons.

Duobus quis mandavit negotiorum administrationem:

quaesitum est an unusquisque mandati iudicio in  
solidum teneatur. <sup>2)</sup> Respondi unumquemque pro solido  
conveniri [debere, dummodo ab utroque non amplius  
debito exigatur.]

As the facts are here stated, we cannot but  
assume that a joint mandate is referred to, the case  
where the ~~administratio~~ administration of the same  
negotia is entrusted to two parties severally being  
hardly possible. Moreover the question raised deals  
with the antithesis solidarity v. partition, and this  
antithesis, ~~as already shown~~, only presents itself  
where we have unity of cause.<sup>1)</sup> Yet the decision, as it  
stands, is to the effect that each mandatary should  
(must? ought to?) be sued for the whole, provided not  
more than the amount due is exactly from both together.  
Here it is plainly inferred that litiscontestatio  
with the one does not free the other, yet under the  
classical law the two obligations, arising as they  
ex hypothesi do from a single cause, must be correally  
related, assuming of course that no inequality or  
non-identification has been introduced.

The final clause 'dummodo...exigatur' is  
however very suspicious, - 'from both together' is not  
happily expressed by 'ab utroque' (= 'from each'),  
'amplius debito exigere' has a thoroughly Triboninian  
ring, - and we have little hesitation in attributing it  
to the compilers.<sup>2)</sup> The preceding 'debere' must also  
be interpolated.<sup>3)</sup> If it means 'must', it is false; for

<sup>2)</sup> see Levy, Konk., p. 203.

<sup>3)</sup> Levy, l.c.

<sup>1)</sup> vide supra p. 157 n. 2.



there was no reason why the mandator should not divide his action.<sup>1)</sup> If it means 'ought to', then we observe that in the preceding question Scaevola is asked to state the legal right of the mandator, not to advise him on his most profitable line of action.

The paragraph thus purged from interpolations, simply states that the co-mandataries are liable singuli in solidum, and not merely pro rata. But it is hardly possible that we have here the full purport of Scaevola's original response. The words 'unumquemque pro solido conveniri' standing alone are abrupt, and it is not a legitimate mode of restoration to add 'posse', for if the compilers had found this word in the text, it is unlikely that they would have changed the same to 'debere'. Moreover, if Scaevola had merely meant to give an affirmative answer to the question 'an unusquisque mandati iudicio in solidum teneatur', he need only have said 'teneri'. Hence we seem justified in concluding that only a fragment of Scaevola's response has been preserved by the compilers. Probably the case he dealt with was considerably more complicated than that here presented.<sup>2)</sup>

- .....
- 2) A formal comparison with Paul. D. (42.1)43 (~~supra p.~~) is perhaps not altogether without value. Gradenwitz, ZSS. 7. p. 65 f., has on good grounds pronounced the remainder of the fragment after 'conveniri' to be interpolated. Here as in our present fragment, we have a somewhat abrupt 'conveniri' followed by an interpolation.

employing as against  
particular defendant

the plaintiff

1) That is to say, by <sup>means of</sup> inserting a praescriptio which restricts the intentio incerta of a formula in ~~some~~ <sup>its</sup> concepta to part of ~~the~~ <sup>the</sup> total interese, or by <sup>employing</sup> ~~means of~~ a formula in factum concepta so framed as to produce the same a corresponding effect; cp. Levy, Romk., p. 117 n. 2.

(2)

D.(11.6)3 pr. Ulpian. XXIV ad edict.

Si duobus mandavero et ambo dolose fecerint, adversus singulos in solidum agi ~~poterit~~ poterit, sed altero convento [si satisfecerit] in alterum actionem denegari oportebit.

In this pr. 'mandavero' is used in an untechnical sense, and refers not to the essentially gratuitous contract of mandate but to the employment of a mensor agrorum who naturally would be paid for his services.<sup>1)</sup> The case here dealt with is very instructive, though strictly speaking it falls without the scope of this treatise.

If mensor made a false return (si falsum mensor falsum modum dixerit), he was liable in a praetorian action in factum<sup>2)</sup> which was delictal (dolose fecerint) and penal in its nature, though the amount of the condemnation was fixed at the plaintiff's interesse.<sup>2)</sup> Hence where two ~~mentes~~ mentores were employed jointly, they would on a strict application of civil law principles be liable cumulatively, each in the plaintiff's full interesse, the end of the obligation and action being theoretically the punishment of wrongdoing.

It was however impossible for the classical jurisprudence to accept the foregoing result. Though penal in its nature, this action in factum fulfilled essentially a reipersecutory function, being to all intents and purposes designed to afford the plaintiff

<sup>1)</sup> Levy, Privatstrafe, p. 55 n. 5. I doubt this determination

<sup>2)</sup> Lenel, Edict., p. 212. process-consumption.

It is however worth while observing that in this matter of the determination of the concurrence a distinction must be drawn between duo domini iubentes



compensation for loss sustained ~~in~~ through the mensor's misconduct. Hence Ulpian considers it the duty of the praetor, after litiscontestatio has taken place with one of the co-mensors, to refuse a further action against the other. Thus we have a case of praetorian consumption corresponding to the civil consumption which would have taken effect had the parties been liable singuli in solidum in an actio mandati and issue had been joined with one of them.

That the words 'si satisfecerit' (~~satisfecerit~~ without an object!) are due to the compilers, may now be accepted as beyond the possibility of doubt.

~~D. (15.4) 5.1. Paul. IV ad Plaut.~~

(3)

D. (15.4) 5.1. Paul. IV ad Plaut.

α. Si unus ex servi dominis iussit contrahi cum ~~et~~ eo, is solus tenebitur:

β. sed si duo iusserunt, cum quovis in solidum agi potest, quia ~~similes~~ similes sunt duobus mandantibus.

The only question decided in period α. β. is that if both masters have authorised a negotium into which the slave enters with a third party, each is liable in solidum, and not merely pro rata, to the latter in an action ~~quod~~ quod iussu, and this decision is justified by a reference to a corresponding rule in the case of two mandators. The ~~the~~ determination of the concurrence between the two actions quod iussu is not mentioned, but beyond doubt this determination was in the sense of process-consumption.

It is however worth while observing that in this matter of the determination of the concurrence a distinction must be drawn between duo domini iubentes

α. ~~xxxxxx~~ and duo mandantes. In the case of the former, as the originating cause of obligation and action is the slave's negotium with the third party, we have unity of cause and therefore/<sup>extensive</sup> process-consumption even though the two iussa have been given independently; in the case of the latter, on the other hand, we cannot have unity of cause and process-consumption unless ~~xxxxxx~~ a single joint mandate be imparted.<sup>1)</sup>

(4) D.(17.1)59.3. Paul. IV respons.

α. Paulus respondit unum ex mandatoribus in solidum eligi posse, etiamsi non sit concessum in mandato:

β. post condemnationem autem in duorum personam ~~et~~ collatam necessario ex causa iudicati singulos pro parte dimidia conveniri posse et debere.

It may perhaps be inferred from <sup>α.</sup> that a party who accepted a joint mandate from two other parties ordinarily required an express undertaking of solidary liability, but, ~~if~~ though this be so, the same period states with perfect distinctness that such an express undertaking was quite superfluous.<sup>2)</sup> The really vital point of Paul's response is probably ~~that contained~~ that contained in period β., but with the question here raised we have already dealt.<sup>3)</sup>

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<sup>1)</sup> Levy, Konk., p.272 n.4

<sup>2)</sup> It is apparently to be assumed that the co-mandators <sup>are</sup> ~~were~~ here not in the position of co-sureties, otherwise they would have a beneficium divisionis: vide supra p.313.

<sup>3)</sup> Supra p.145 ff

<sup>1)</sup> op. also sch. Tac. ad Tit. to Bas. XXIII.1.44 (Reichb. II. p. 641 (3) i.m.); Levy, Konk., p.200 f.

<sup>2)</sup> Konk., p.200; Sponsio, p.211 n.2.



(5) C. (8.40(41))23. ~~Diocletian~~ Diocletian. a. 294.

- α. Reos principales vel mandatores [simpliciter acceptos]  
~~eligere~~ eligere vel pro parte convenire [vel satis non  
faciente contra quem egeras primo, post ad alium reverti  
eum nullus de his electione liberetur], licet.

C. eod. 28 pr. Justinian. a. ~~531~~ 531.

- β. Generaliter sancimus, quemadmodum in mandatoribus  
statutum est, ut contestatione contra unum ex his facta  
alter non liberetur, ita et in fideiussoribus observari.

The words quoted from Justinian's constitution  
(period α.) are capable only of one interpretation,  
namely, that process-consumption originally did operate  
extensively as ~~between~~ between mandatores, but latterly this  
had been altered by statute, and the new rule is now  
applied as between fideiussores also. <sup>1)</sup> We must however  
observe that while under the classical law fideiussores  
for the same principal debt stood in a process-consumption  
relation (accessory correalty) whether they were taken  
bound ~~jointly or separately~~ together or separately,  
mandatores for the same principal debt only stood in such  
a relation where a single joint mandate had been impart-  
ed. This distinction is based on the fact that a fide-  
~~iussory obligation is formally accessory to the principal~~  
iussory obligation is formally accessory to the principal  
while a mandatory obligation is not, the accessory  
being here material only.

The question now arises whether, as Levy <sup>2)</sup>  
thinks probable, Justinian or one of his immediate  
predecessors had prior to 531 abolished extensive process-  
consumption as between joint mandators, though the

<sup>1)</sup> cp. also sch. τοῦ αὐτοῦ to Bas. XXIII.1.44 (Heimb. II. p. 641  
(3) i.m.); Levy, Konk., p. 200 f.

<sup>2)</sup> Konk., p. 200; Sponsio, p. 211 n. 2.

constitution by which this was accomplished has not been preserved. As against this view two objections may be raised: (1) Why should extensive process-consumption have been abolished as between joint mandators before it had been abolished as between <sup>the</sup> correal debtors?

(ii) If such ~~an~~ a constitution as Levy imagines had actually been made, it is somewhat surprising that the compilers of the Code should not have regarded the same worthy of preservation. I therefore venture to conjecture that the reference in C.(8.40(41))28 pr. may be to C.eod.23.

~~That~~ The last mentioned constitution (period  $\beta$ .) cannot in its present form be genuine, and the awkward passage 'vel satis...liberetur' may without hesitation be attributed to the compilers.<sup>1)</sup> But even <sup>this</sup> ~~the elimination~~ elimination does not remove all difficulty from the constitution. In the first place, ~~an~~ what is the precise significance of the words 'simpliciter acceptos', which we must assume to refer to '~~reos~~ mandatores' alone, though grammatically they might refer to 'reos principales' also? <sup>2)</sup> Levy interprets them in the sense that the mandators have been taken bound simply consensu, no stipulation being interposed, and cites by way of comparison C.(5.15 12)6 of the year 236, 'conventiones simplici'. I venture however to regard it as more probable that the absence of <sup>y</sup> any agreement giving the mandators a beneficium excussionis is here referred to, in which case we can have little difficulty in attributing the words in question to the compilers. In the second place, we note that the expression 'reos principales vel mandatores eligere' cannot, as might at first

<sup>1)</sup> Levy, Konk., p.201 f.

<sup>2)</sup> Sponsio, p.214 n.1.



or more  
 sight be thought, mean'to elect one/of the various  
 principal debtors and ~~mandatorum~~ mandators'; its only  
 possible significance is 'to elect the principal debtors  
 or the mandators', i.e. ~~inter se electio principalium debitorum~~  
~~inter se electio mandatorum~~ to choose between suing the one group  
 (or any one or more members thereof) or the other  
 group (or any one or more members thereof). Accordingly  
 we seem entitled to conjecture that Diocletian's original  
 decision may have proceeded on somewhat the same lines as  
 that of Alexander C. (5.57)1.

Be all this as it may, the fact remains clear  
 that the compilers interpolated period  $\alpha$ , so as to  
 eliminate extensive process-consumption both as between  
 principal debtors and as between joint mandators.<sup>1)</sup> Under  
 these circumstances I venture that the words 'quemadmodum  
 in mandatoribus statutum ~~est~~ est' in  $\beta$ . may simply refer  
 to  $\alpha$ . It seems very likely that c.28 in its present  
 form is the work of the revisors of the Code in 534.  
 Justinian's original constitution abolishing extensive  
 process-consumption as between fideiussores may have begun  
 with the words 'generalis lege sancimus' in  $\gamma$  1, and it  
 seems almost  $\times$  certain that the abolition of extensive  
 process-consumption as between principal correal debtors  
 was accomplished by means of a separate constitution  
 which the revisors of the Code incorporated in c.28  
 as  $\gamma$  2. Certainly the reference to c.23 as having  
 abolished extensive process-consumption between joint  
 mandators was not very happy, for this constitution  
 might equally well be referred to as having abolished

<sup>1)</sup> No process-consumption ever existed between  
 a principal debtor and a mandator; vide supra p. 184 ff.  
 ep. supra p.

1) ex diversis in contrahendo obligati sunt  
 2) condemnatione  
 3) et pecunie soluta

extensive ~~in~~ process-consumption as between principal correal debtors, though this latter reform was actually carried by § 2 of c. 28 itself. Experience, however, teaches us that we may expect anything from the compilers.

Then comes to be, what did Papinian probably write?

According to the view commonly entertained at the present day, Papinian simply wrote: *plures eiusdem pecuniae credendae mandatores, si unus iudicio eligatur,*

(6) D. (46.1) 52.3. Papinian. XI respons.

- α. *Plures eiusdem pecuniae credendae mandatores* <-> <sup>1)</sup>
- β. *si unus <sup>in</sup> iudicio eligatur, [absolutione] <~> <sup>2)</sup> quoque secuta <+> <sup>3)</sup> non ~~liberantur~~ liberantur [sed] omnes [liberantur pecunia soluta].*

Any attempt to uphold the genuineness of this paragraph in its present form is out of the question. Under the classical law, if *litiscontestatio* with the one mandator, M., does not free the other, S., any suggestion that an absolutory judgment in favour of M. could do so, borders on absurdity. Under the ~~the~~ Justinianian law, extensive on the other hand, the abolition of process-consumption brings the question as to the effect of an absolutory judgment into prominence. Suppose M. and S. are correal debtors and the creditor sues M. in solidum, *litiscontestatio* in this action does not now free S.; but what is the position if the judge absolves M. on a ground which is not merely personal to the latter alone, but amounts to a denial of the existence of the obligation as a whole? If S. is subsequently sued, can he plead M.'s absolution as *res iudicata* in his favour?

To this question a negative answer is given in the present ~~fragment~~ paragraph. Accordingly as the paragraph is meaningless from the standpoint of the classical law,

- 1) *ex diversis contractibus obligati sunt.*  
 2) *condemnatione*  
 3) *et pecunia soluta*



but makes excellent sense from that of the Justinianian law, we are amply justified in attributing it, in its present form, to the compilers. The whole question then comes to be, what did Papinian probably write?

<sup>A</sup> According to the view commonly entertained at the present day, Papinian simply wrote: *plures eiusdem pecuniae credendae mandatores, si unus iudicio eligatur, omnes liberabuntur.*<sup>n</sup> Here it is assumed that the mandate is joint, and the elementary result is stated that litigation with one mandator frees the rest. But to this restoration there are a number of objections. In the first place, it is almost inconceivable that such an elementary point as is here brought out should have come to figure in a Papinian's responsa. In the second place, the restoration in question is far from elegant; we should have expected Papinian to have written 'ex pluribus ~~mandatoribus~~.... mandatoribus...' In the third place, as ~~maxime~~ a case of 'credit-mandate' is expressly in point, the words of the restoration are hardly compatible with Papinian's ~~own~~ own statement in D.(27.7)7 that ~~the~~ <sup>pecuniae credendae</sup> mandators have a beneficium divisionis: *nam et si mandato plurium pecunia credatur, aequè dividitur actio.*

Accordingly, in my opinion the view of Eisele is much more probable that Papinian was here dealing with the case of separate mandates directed to the same end, and that the denial of process-consumption is genuine. In point of fact the structure of the paragraph

<sup>1)</sup> See Levy, *Konk.*, p.202 f.; *Sponsio*, p.214 f. Krüger, *Dig.* wrongly attributes this restoration to Eisele.

cp. ~~supra~~ p.

<sup>2)</sup> *Archiv. f.d. Civil.Prax.*, 77.p.461.

it seems highly probable that something has been omitted after 'mandatores', and I ~~therefore~~ <sup>here</sup> suggest that Papinian may have written: <sup>contractibus</sup> ex diversis ~~mandatis~~ <sup>g</sup> obligati sunt, or the like.

If this initial conjecture be accepted, ~~we~~ then we may take Papinian.D. (46.3)95.10<sup>1)</sup> as a model for our restoration, and I accordingly would reconstruct period thus: si unus iudicio eligatur condemnatione quoque secuta et pecunia soluta non liberantur omnes. Obviously however the mandatary, after having obtained full satisfaction of his interest from one of the mandators cannot in equity recover anything further from the others, and hence the ~~sub~~ <sup>of</sup> point ~~in~~ the decision as restored must be that the mandator who has made payment may still obtain a cession of the mandatary's rights of action against the other mandators for the purpose of working out proportionate regress. We may therefore assume that Papinian continued somewhat as follows: sed ~~et~~ ei qui condemnatus solverit creditor actiones suas ~~actiones~~ adversus ceteros praestare debet. So restored the paragraph agrees with our a priori conceptions as to the result where two or more parties give independent mandates directed to one and the same end. Legal solidarity, whether cooreal or simple, is excluded through absence of unity of cause, and accordingly at law the result is cumulation.

Let us take a concrete case. Gaius asks Titius for a loan of X; T. gets M. and S., each independently of the other to give him ~~x~~ mandates to lend X to G.; T. would be perfectly entitled to treat these mandates as quite unrelated, and on the strength of both to lend XX to G. But ex hypothesi G. only wishes to borrow X,

<sup>1)</sup> supra p. 184



and so on the strength of both mandates <sup>1)</sup> a single sum of this amount alone is lent. If G. duly repays the X., then clearly nothing is due under either mandate, but suppose he fails to do so, what is the result? At first sight we might be inclined to say that T. must attribute V to the one mandate and V to the other.

This solution must however be rejected; ~~partitionis~~ ~~impossibile~~ ~~without~~ ~~unity~~ ~~of~~ ~~cause~~ we cannot have ~~partitionis~~ partition without unity of cause. M. and S. have each given a separate mandate to lend X, and each is responsible for the full amount. We next think of simple solidarity, but this result again is, we believe, excluded in the absence of unity of cause. The only alternative ~~if~~ is legal solidarity with equitable intervention to prevent the mandatory recovering twice over. If T. recovers the full amount from one of the ~~mandatarios~~ mandatarios, and subsequently sues the other, the iudex in the exercise of his bonae fidei ~~iudicis~~ officium is clearly bound to dismiss the action. Moreover, ~~normally~~, we think, the same result must <sup>normally</sup> take place even where T. has merely joined issue with the one. As we have seen reason to believe,<sup>2)</sup> equity follows the law in ~~giving~~ admitting extensive process-consumption under ordinary circumstances at any rate. But neither solutio nor litiscontestatio prejudices the right of a mandator who makes payment to claim an assignment of the creditor's rights of action against the others for the ~~per~~ purpose of enabling him to work out proportionate relief.

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<sup>1)</sup> 'utriusque mandatum intuitus'; perhaps Ulpian was thinking of the case of separate mandates when he wrote the final words of D.(17.1)21: quemadmodum, si duo mihi mandassem ut tibi crederem, utrumque haberem obligatum.

<sup>2)</sup> supra p. 194, 201